CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1931

No. 677

CONTINENTAL BAKING COMPANY, GENERAL BAKING COMPANY, SCHULZE BAKING COMPANY, ET AL., APPELLANTS,

vs.

HARRY H. WOODRING, AS GOVERNOR OF THE STATE OF KANSAS, ET AL., ETC., ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS

FILED FEBRUARY 3, 1932

(36,491)

(36,491)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931

No. 677

CONTINENTAL BAKING COMPANY, GENERAL BAKING COMPANY, SCHULZE BAKING COMPANY, ET AL., APPELLANTS,

vs.

HARRY H. WOODRING, AS GOVERNOR OF THE STATE OF KANSAS, ET AL., ETC., ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS

INDEX

	Original	Print
Record from district court of the United States, District of Kansas	1	1
Citation and acknowledgment of service (omitted in printing)	1	
Bill of complaint	3	1
Exhibit "A"—Copy of Chapter 236, Laws of Kansas, 1931	15	11
Temporary restraining order	22	20
Bond on restraining order (omitted in printing)	24	
Motion to dismiss bill of complaint	26	21
Notice of hearing motion to dismiss	27	22
Request for convening three-judge court	27	23
Petitioners' consent to request for convening of three-judge court	28	23
Order designating judges and fixing date of hearing of three-judge court	29	24

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 29, 1932

	Original	Print
Notice of hearing before three-judge court	30	25
Order of submission	30½	25
Opinion, McDermott, J.	31	26
Dissenting opinion, Kennamer, J.	54	45
Decree	55	46
Petition for appeal, assignments of error, and prayer for reversal	55	46
Order allowing appeal	62	52
Supersedeas bond on appeal.....(omitted in printing)..	63	
Præcipe for transcript of record	66	53
Clerk's certificate.....(omitted in printing)..	68	
Statement of points to be relied upon and designation as to printing record	69	55

[fols. a & 1] Citation in usual form showing service on Roland Boynton et al., filed Jan. 9, 1932, omitted in printing.

[fols. 2 & 3]

IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS, FIRST DIVISION

No. 1444-N

CONTINENTAL BAKING COMPANY, a Corporation; GENERAL BAKING COMPANY, a Corporation; SCHULZE BAKING COMPANY, a Corporation, and CARLE WILKE, Doing Business as the Wilke Baking Company, Petitioners,

vs.

HARRY H. WOODRING, as Governor of the State of Kansas; Roland Boynton, as Attorney General of the State of Kansas; Jesse W. Greenleaf, Thurman Hill, and Charles W. Campbell, as Members of the Public Service Commission of the State of Kansas, Defendants

BILL OF COMPLAINT—Filed Sept. 21, 1931

To the Honorable Judges of the District Court of the United States for the District of Kansas, First Division:

Come now the petitioners in the above entitled cause and for a cause of action against the above named defendants, Harry H. Woodring, as Governor of the State of Kansas, Roland Boynton, as Attorney General of the State of Kansas, Jesse W. Greenleaf, Thurman Hill and Charles W. Campbell, as members of the Public Service Commission of the State of Kansas, respectfully allege:

1. That your petitioner, Continental Baking Company, is and at all times herein mentioned was a citizen and resident of these United States, and a corporation organized and existing under and by virtue of the laws of the State of Delaware with its principal place of business in the City of New York, County of New York, State of New York. That petitioner, Continental Baking Company, is engaged in the business of manufacturing bread and other bakery products at plants owned by it and located in the

City of Wichita, County of Sedgwick, State of Kansas; the City of St. Joseph, County of Buchanan, State of Missouri; and the City of Kansas City, County of Jackson, State of Missouri.

[fol. 4] 2. That your petitioner, General Baking Company, is and at all times herein mentioned was a citizen and resident of these United States and a corporation organized and existing under and by virtue of the laws of the State of New York, with its principal place of business in the City of New York, County of New York, State of New York. That petitioner, General Baking Company, is engaged in the business of manufacturing bread and other bakery products in plants owned by it and located in the City of Wichita, County of Sedgwick, State of Kansas; City of Hutchinson, County of Reno, State of Kansas; City of Kansas City, County of Wyandotte, State of Kansas; and the City of Kansas City, County of Jackson, State of Missouri.

3. That your petitioner, Schulze Baking Company is and at all times herein mentioned was a citizen and a resident of these United States, and a corporation organized and existing under and by virtue of the laws of the State of Illinois, with its principal place of business in the City of Chicago, County of Cook, State of Illinois. That petitioner, Schulze Baking Company, is engaged in the business of manufacturing bread and other bakery products at a plant owned by it and located in the City of Kansas City, County of Jackson, State of Missouri.

4. That your petitioner Carl Wilke, doing business as the Wilke Baking Company, is and at all times herein mentioned was a citizen and resident of these United States, residing in Beatrice, County of Gage, State of Nebraska, and engaged in the business of manufacturing bread and other bakery products in a plant owned by him and located in the town of Beatrice, County of Gage, State of Nebraska.

5. That the defendant, Harry H. Woodring, as Governor of the State of Kansas is, was and at all times hereinafter mentioned the duly elected, qualified and acting Governor of the State of Kansas, located in the City of Topeka, County of Shawnee, State of Kansas.

[fol. 5] 6. That defendant, Roland Boynton, as Attorney General of the State of Kansas, is and was at all times hereinafter mentioned the duly elected, qualified and acting Attorney General of the State of Kansas, and located in the City of Topeka, County of Shawnee, State of Kansas.

7. That defendants, Jesse W. Greenleaf, Thurman Hill, and Charles W. Campbell, as Members of the Public Service Commission of the State of Kansas, are and were at all times hereinafter mentioned the duly appointed, qualified and acting members of the Public Service Commission of the State of Kansas, and located in the City of Topeka, County of Shawnee, State of Kansas.

8. That the amount in controversy between each of the petitioners and each of the defendants herein exceeds the sum of Three Thousand ($3,000.00) Dollars, exclusive of interest and costs.

9. That the jurisdiction of this court is invoked because and by reason of the attempt to deprive petitioners under color of law, statute and regulation of the State of Kansas of rights, privileges and immunities secured them by the constitution of the United States, and rights secured by the laws of the United States providing for equal rights of citizens of the United States, and of all persons within the jurisdiction of the United States, and because of the attempt to deprive petitioners of certain rights arising under the laws regulating commerce, and between citizens of one state and a foreign state, its citizens and subjects.

10. Petitioners further allege that they are now and have for many years past been the owners of the manufacturing plants hereinbefore set forth, and at said plants have manufactured bread and other bakery products, and that from said plants they have delivered bread and other bakery products sold by them by means of motor vehicles in the [fol. 6] cities in which the bread and other bakery products are manufactured, and to customers in cities and points outside of the cities in which their plants are located and within and beyond a radius of twenty-five miles from the corporate limits of said cities in which their plants are located, and that your petitioners, Continental Baking Company, General Baking Company, Schulze Baking Com-

pany and Carl Wilke, doing business as Wilke Baking Company, have and for many years past been delivering bread and other bakery products manufactured in their plants outside of the State of Kansas to customers within the State of Kansas located within and beyond a radius of twenty-five miles from their plant and within a radius of twenty-five miles from the corporate limits of the city in which their plant is located and within and beyond a radius of twenty-five miles from the state line of the State of Kansas and the state in which their plants are located.

11. Your petitioners further allege that the amount of business done by petitioners in the State of Kansas each year amounts to many thousands of dollars per plant, and in each plant is greatly in excess of Three Thousand ($3,000) Dollars, exclusive of interest and costs.

12. Your petitioners further allege that during the year 1931 the legislature of the State of Kansas duly convened and in session passed and enacted Senate Bill 387, which is an act relating to the transportation by motor vehicles over public highways of the State of Kansas, and that the legislature of Kansas repealed all parts of Chapter 206 of the Laws of 1925, and Chapter 222 of the Laws of 1929, being Sections 66-196 to 66-1107 inclusive of the Laws of 1930, Supplement to the Revised Laws of Kansas 1923, [fol. 7] inconsistent or in conflict with Senate Bill 387. That said Senate Bill 387 by said act of the Legislature of the State of Kansas became Chapter 236 of the Laws of 1931 of the Laws of Kansas, and is now the statutory enacted law of the State of Kansas relating to motor carriers and the transportation thereon over the public highways.

13. Your petitioners further state that said Chapter 236 of the Laws of 1931 of the State of Kansas, the same being Senate Bill 387 as passed by the Legislature of the State of Kansas, was approved and signed by defendant, Harry H. Woodring, as Governor of the State of Kansas, and approved by defendant, Roland Boynton, as Attorney General of the State of Kansas, and is now in effect in the State of Kansas as the statutory law of that state.

14. Your petitioners allege that said Chapter 236 of the Laws of 1931 of the State of Kansas, the same being Senate

Bill 387, violates the provisions of the Constitution of the United States and the Amendments thereto in that; it is unreasonable, arbitrary, and discriminatory; it compels private carriers of property against their will to assume the duties and burdens of common carriers; it deprives petitioners of property without due process of law; it impairs the obligations imposed upon plaintiffs by their respective contracts which they and each of them have with customers in the State of Kansas; it compels petitioners to submit to the provisions of the act and pay taxes and charges to the State of Kansas while at the same time it exempts privileged classes, to-wit: owners of live stock and farm products engaged in transporting the same to market, or transporting supplies for their own use in their own automobiles; it compels said petitioners to submit to the provisions of this act to pay taxes and charges for the use of the highways, for the support of the Public Service Commission of the State of Kansas, while it at the same time exempts from all these burdens motor carriers operating [fol. 8] wholly within any city or village in the State of Kansas, or private motor carriers who operate within a radius of twenty-five miles beyond the corporate limits of such city or village; it requires private carriers of property to submit to all regulations and rules of the act and as promulgated by the Public Service Commission of the State of Kansas in the same manner as though they were common carriers and carriers engaged solely in intra-state commerce, and places the same burdens upon private carriers of property as upon common carriers; it requires petitioners to maintain schedules, submit their books for inspection, and conduct their business subject to rules and regulations of the Public Service Commission of Kansas, and subjects petitioners for failing to comply with said act to penalties, charges, prosecutions and imprisonment; it requires of petitioners the above requirements even though their place of business and property is located outside the State of Kansas.

15. Your petitioners further allege that they and each of them sells and delivers bread and other bakery products manufactured by it or him as set forth above to it or his customers in the State of Kansas in motor vehicles as defined by said act in Section 1, sub-head a of said law and

act, and over the public highways of the State of Kansas as defined by said section, sub-head g of said law and act. That the bread and bakery products so manufactured, sold and delivered by petitioners are delivered in motor vehicles owned by and the private property of each petitioner; that each petitioner sells and delivers and transports only the products of its own bakery in said motor vehicles; that no passengers except the employees of petitioners engaged in operating and delivering petitioners' products are carried in said motor vehicles; that no property of others than petitioners is transported in said motor vehicles; that petitioners are not public motor carriers of property, contract motor carriers of property, public motor carriers of passengers, contract motor carriers of passengers, as defined by Section 1, sub-heads, b, c, e, and f of Chapter 236 of the [fol. 9] Laws of 1931 of the State of Kansas, and that the term "motor vehicle" herein is used as is defined by Section 1, sub-head a of said Chapter 236. That no extra charge is made to consumers and customers of petitioners for the delivery in motor vehicles over the highways of Kansas of the products of petitioners' plants as a transportation charge.

16. Your petitioners further allege that they and each of them are private motor carriers of property as defined by said Act, Section 1, sub-head d of said law and act.

17. Your petitioners further allege with respect to Section 2 of said law and act that said section of said act deprives the petitioners of property without due process of law; denies petitioners the equal protection of the law as guaranteed by the constitution of the United States and the Fourteenth Amendment thereto, in that it compels said petitioners to submit to the provisions of this act and pay charges and taxes for the use of the highways and in support of the Public Service Commission of the State of Kansas, and subjects them to fines, charges and imprisonment for failing so to do, while at the same time it exempts from all of these burdens motor carriers in the transportation of live stock and farm products to market by the owners thereof, or supplies for his own use in his own motor vehicle, or to the transportation of children to and from school; in that it exempts from the operation of this

act and said charges, taxes, prosecutions, fines and burdens private motor carriers who operate within a radius of twenty-five miles beyond the corporate limits of any city or village.

Your petitioners further allege that said Section 2 is arbitrary, discriminatory and void for uncertainty as between the different plants and location thereof of petitioners and others in that (a) said Act does not provide whether petitioners are free from taxation only in the city in which the plant is located or in the city in which the motor vehicle of petitioners operate; (b) whether the radius of twenty-five miles exempted is a radius free from taxation or becomes a taxable radius when the motor [fol. 10] vehicle exceeds the twenty-five mile limit, and then whether or not the entire trip of the motor vehicle is subject to taxation or only the excess mileage; (c) whether the motor vehicles from plants of petitioners located without the State of Kansas are taxable on entering the State of Kansas, and if so, whether or not they are taxable at the point of entry, taxable at a uniform point of entry, or taxable at the nearest point of entry into the State of Kansas. (d) Or entitled to a free radius of twenty-five miles, and if so, whether the same is from the point of entry in the State, a uniform point of entry in the State, or the nearest point of entry in the State of Kansas.

Petitioners further allege that said Section 2 of said law and act is discriminatory, arbitrary and void, under Section 2 of Article IV of the Constitution of the United States and the Fourteenth Amendment to the Constitution of the United States, the due process of law clause and equal protection clause thereof, in that it discriminates between petitioners and their plants located outside the State of Kansas and the plants of bakers of similar products located in the State of Kansas in that a radius not subject to taxation of twenty-five miles is given plants located in the State of Kansas and no such radius is given to plants located outside the State of Kansas.

18. Your petitioners further allege with respect to sections 4, 5, and 8 of said law and act, that said sections 4, 5, and 8 of said act are unconstitutional, discriminatory, arbitrary and void in that they make no distinction between common carriers of property and private carriers of prop-

erty such as petitioners. That said State Commission is explicitly invested with authority to supervise petitioners, which embraces within its definition the right to regulate their business and service, inspect and prescribe their method of keeping books which should set up adequate depreciation charges, and generally to make rules govern- [fol. 11] ing their operations, schedules of operation, and the right to suspend petitioners' business for failure to comply with said law and act or rules and regulations promulgated by said Public Service Commission, etc. Said act provides that all carriers within the act whether public or private are put by the terms of the statute precisely on the same footing. That all must obtain licenses of public convenience and necessity upon application and conditions. Said act while not in its express terms gives the Public Service Commission the power to demand that private carriers of property shall constitute themselves common carriers and the statute purports to subject all carriers within the terms of its definition to the same obligation. That said sections unreasonably require petitioners private carriers of property, to submit information to the Commission over which the Commission could have no power to require or right to have. That they place upon petitioners, who are private carriers of property, all of the burdens of common carriers. Said act is therefore unconstitutional and void in violation of the Const-tution of the United States and the Fourteenth Amendment thereof by taking property without due process of law in violation of the Constitution of the United States, Article I, Section 8 regulating interstate commerce.

19. Petitioners allege with respect to Section 13 of said law and act that said law and act provides an arbitrary tax based upon twice the amount of tonnage of the vehicle employed by petitioners, and makes no provision for the difference between a loaded truck, requiring petitioners to pay the same compensation for the empty trucks that they would be compelled to pay were said trucks loaded double their maximum capacity. That said section is unreasonable, unjust, arbitrary and denies petitioners the equal protection of the law and takes petitioners' property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States and is void.

[fol. 12] 20. Petitioners allege with respect to sections 15, 16, 17 and 19 of said law and act that said sections are unconstitutional and void for the reasons set forth in paragraph 18 of petitioners' petition herein, and for the further reason that said sections subject petitioners, their servants, agents and employees to fine and their property subject to attachment for failure to conform to and abide by the provisions of said act, all in violation of the Fourteenth Amendment to the Constitution of the United States.

21. Petitioners further allege with respect to section 21 of said law and act, that said section is in violation of the Constitution of the United States and the Fourteenth Amendment thereof and in violation of Article I, section 8 of the Constitution of the United States as set forth in paragraph 18 of petitioners' petition, and for the further reason that it requires and compels petitioners to take out insurance on property carried wholly in interstate commerce. And further under said act, and section 21 thereof, certain privileged classes in Section 2, and also in Section 21, are exempted from the requirement of obtaining bond and of paying for and obtaining in-urance required of petitioners, which is violation of the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States, and of Section 2 of Article IV of the Constitution of the United States.

22. Petitioners further allege with respect to Section 22 of said law and act that said section is in violation of the Constitution of the United States and Article I, of section 8 thereof, and the Fourteenth Amendment thereto for the reasons set forth in paragraph 18 of petitioners' petition herein.

23. Petitioners further allege that the act hereinbefore described, Chapter 236 of the Laws of 1931 of the State of Kansas, Senate Bill 387, as passed by the Legislature of the State of Kansas, became effective and in full force and effect the 1st day of July, 1931, and defendants herein and each of them as officers of the State of Kansas, charged [fol. 13] with the duty of enforcing the law, notified petitioners to comply with the act, and through their agents, servants and employees arrested and are threatening to

arrest petitioners, their agents, servants and employees on the public highways of the State of Kansas, requiring them to comply in all respects with the terms and provisions of this act.

24. A copy of the laws of Kansas of 1931, Chapter 236, being Senate Bill 387, is hereto attached and made a part hereof and marked Exhibit "A".

25. Petitioners further allege that if they are not permitted to deliver bread and other bakery products manufactured by them in motor vehicles as hereinbefore alleged because of the enforcement of said acts and each of them by the defendants herein and the law enforcement officers of the State of Kansas, they will suffer great and irreparable loss in that they will be unable to carry out the orders for said products placed with them and other and competing concerns will secure the business. That petitioners will violate the terms of their sales contracts and petitioners will be subject to suits for damages and the cancellation of their contracts. That the business of petitioners is such that the interruption thereof for a single day will practically destroy the entire business of petitioners, which will work a great hardship on petitioners and upon the food supply of individual citizens of the State of Kansas. That the same will result in immediate and irreparable loss to these petitioners. If said acts are enforced and unless petitioners fully comply with same, their property will be confiscated by the Public Service Commission and petitioners' plants will be closed down and their business lost and destroyed.

26. That petitioners are without a plain, adequate and complete remedy at law in the premises except in a suit of this nature, and by injunction issued by this court only can they be protected in their personal and property rights as aforesaid and saved from immediate damage and irreparable financial loss. That immediate and irreparable injury [fol. 14] will result to your petitioners if a restraining order is not forthwith issued restraining the enforcement of said Chapter 236 of the Laws of Kansas, 1931, the same being Senate Bill 387.

Wherefore your petitioners respectfully pray to the court that a summons be issued forthwith to said defendants to

answer petitioners' petition herein; that the said defendants, Harry H. Woodring, as Governor of the State of Kansas, Roland Boynton, as Attorney General of the State of Kansas, Jesse W. Greenleaf, Thurman Hill and Charles W. Campbell as members of the Public Service Commission of the State of Kansas, and every one of their officers, agents and employees and those acting in concert with them be enjoined from enforcing said law and act aforesaid; that a temporary restraining order be issued forthwith restraining the enforcement of said statute until such time as the court may hear and determine upon the issuance of a temporary injunction and that a temporary injunction with temporary restraint meantime be granted, restraining the enforcement of said statute as aforesaid; that upon hearing the same be made a final order, and that petitioners have all other and further proper relief that may to the court seem just and proper.

R. L. Stephens, Charles R. Wilke, John C. Grover,
Attorneys for Petitioners.

Duly sworn to by C. B. Hoff. Jurat omitted in printing.

[fol. 15] EXHIBIT "A" TO BILL OF COMPLAINT

Chapter 236, Laws of 1931

Relating to Motor Carriers and to Transportation Thereon Over the Public Highways

Senate Bill No. 387

An Act relating to transportation by motor vehicles over the public highways of Kansas, and repealing all parts of chapter 206 of the Laws of 1925 and chapter 222 of the Laws of 1929 (being sections 66-196 to 66-1,107, inclusive, of the 1930 Supplement to the Revised Statutes of Kansas, 1923), inconsistent or in conflict with this act

Be it enacted by the Legislature of the State of Kansas:

Section 1. (*a*) The term "motor vehicle" when used in this act means any automobile, automobile truck, trailer, motor bus, or any other self-propelled or motor-driven

vehicle used upon any public highway of this state for the purpose of transporting persons or property. (*b*) The term "public motor carrier of property" when used in this act shall mean any person engaged in the transportation by motor vehicle of property for hire as a common carrier having a fixed termini or route. (*c*) The term "contract motor carrier of property" when used in this act shall be construed to mean any person not a public motor carrier of property engaged in the transportation by motor vehicle of property for hire as a business. (*d*) The term "private motor carrier of property" when used in this act shall be construed to mean any person engaged in the transportation by motor vehicle of property sold or to be sold by him in furtherance of any private commercial enterprise. (*e*) The term "public motor carrier of passengers" when used in this act shall mean any person engaged in the transportation by motor vehicle of passengers or express for hire as a common carrier having a fixed termini or route. (*f*) The term "contract motor carrier of passengers" when used in this act shall be construed to mean any person not a public motor carrier of passengers engaged in the transportation by motor vehicle of passengers or express for hire. (*g*) The term "public highway" when used in this act shall mean every public street, road or highway or thoroughfare of any kind used by the public.

Sec. 2. That this act shall not apply to motor carriers who shall operate wholly within any city or village of this state, or private motor carriers who operate within a radius of twenty-five miles beyond the corporate limits of such city, or any village, nor to the transportation of live stock and farm products to market by the owner thereof or supplies for his own use in his own motor vehicle; or to the transportation of children to and from school.

Sec. 3. All "public motor carriers of property or passengers" as defined in this act are hereby declared to be common carriers within the meaning of the public utility laws of this state, and are hereby declared to be affected with a public interest and subject to this act and to the laws of this state, including the regulation of all rates and charges now in force or that hereafter may be enacted, pertaining to public utilities and common carriers as far as applicable, and not in conflict herewith.

[fol. 16] Sec. 4. No public motor carrier of property or passengers, contract motor carrier of property or passengers or private motor carrier of property shall operate any motor vehicle for the t-ansportation of either persons or property for compensation on any public highway in this state except in accordance with the provisions of this act.

Sec. 5. The public service commission is hereby vested with power and authority and it shall be its duty to license, supervise and regulate every public motor carrier of property or of passengers in this state and to fix and approve reasonable maximum or minimum or maximum and minimum rates, fares, charges, classifications and rules and regulations pertaining thereto. And the public service commission is hereby vested with power and authority and it shall be its duty to license, supervise and regulate every public motor carrier of property or of passengers, contract motor carrier of property or of passengers and private motor carrier of property in the state and to regulate and supervise the accounts, schedules, service and method of operation of same; to prescribe a uniform system and classification of accounts to be used; to require the filing of annual and other reports and any other data; and to supervise and regulate "public motor carriers of property or of passengers," "contract motor carriers of property or of passengers" and "private motor carriers of property," in all matters affecting the relationship between such "public motor carriers of property or of passengers," "contract motor carriers of property or of passengers" and "private motor carriers of property" and the traveling and shipping public. The public service commission shall have power and authority by general order or otherwise to prescribe reasonable and necessary rules and regulations governing all such motor carriers. All laws relating to the powers, duties, authority and jurisdiction of the public service commission over common carriers are hereby made applicable to all such motor carriers except as herein otherwise specifically provided.

Sec, 6. All transportation charges made by any public motor carrier shall be just and reasonable.

Sec. 7. It shall be unlawful for any public motor carrier to operate as a carrier of intrastate commerce within this

state without first having obtained from the public service commission a certificate of convenience and necessity. The public service commission, upon the filing of application for such certificate, shall fix a time and place for hearing thereon, which shall not be less than twenty nor more than thirty days after such filing. The public service commission shall cause a copy of such application and notice of hearing thereon to be served at least ten days before the hearing upon an officer or owner of every common carrier that is operating or has applied for a certificate to operate in the territory proposed to be served by the applicant, and on the city clerk of every city into or through which said motor carrier may desire to operate; and any such common carrier or city is hereby declared to be an interested party to said proceedings and may offer testimony for or [fol. 17] against the granting of such certificate, and any other interested person may offer testimony at such hearing. If the commission finds from the evidence that the proposed service or any part thereof will promote the public convenience and necessity, the commission shall issue the certificate; otherwise such certificate shall be denied. Before granting a certificate to a public motor carrier, the commission shall take into consideration other existing transportation facilities in the territory for which a certificate is sought, and in case it appears from the evidence that the service furnished by existing transportation facilities is reasonably adequate, the commission shall not grant such certificate.

Sec. 8. It shall be unlawful for any "contract motor carrier of property or passengers" or "private motor carrier of property" to operate as a carrier of property or passengers within this state either in intrastate commerce or in interstate commerce without first having obtained from the public service commission a license therefor. An application shall be made to the public service commission in writing stating the ownership, financial condition, equipment to be used and physical property of the applicant, and such other information as the commission may request. Upon receipt of such information and on compliance with the regulations and payment of fees, the public service commission shall issue a license to such applicant.

Sec. 9. It shall be unlawful for any public motor carrier to operate as a common carrier of interstate commerce within this state, without first having furnished the public service commission in writing full information concerning: (*a*) The ownership, financial condition, equipment to be used and physical property of the applicant; (*b*) the complete route over which the applicant desires to operate; (*c*) the proposed rates, schedule or schedules and/or time cards of the carrier; (*d*) such other information as the commission may request covering observance of state police regulations and payment of fees. Upon receipt of such information and payment of fees the commission shall issue such interstate carrier a license.

Sec. 10. The public service commission shall prescribe forms of applications for certificates and licenses for the use of prospective applicants and shall make regulations for the filing thereof. The commission may designate one of its attorneys to take evidence at the hearing of any application for a certificate or license and submit findings of fact to the commission.

Sec. 11. Where a certificate or license shall have been regularly issued, and thereafter the carrier to whom the same shall have been issued, not being in default in the performance of any of the terms of this act, shall transfer or assign such certificate or license to another qualified hereunder, such certificate or license shall, upon application, be, by the commission, transferred to such assignee upon compliance by the latter with the terms of this act. Subject to [fol. 18] any right a holder of any such certificate or license may have to engage in interstate commerce, no license or certificate issued in accordance with the terms of this act shall be construed to be either a franchise or irrevocable.

Sec. 12. No public motor carrier authorized by this act to operate shall discontinue any service established by this act without an order of the public service commission granted only after hearing upon due notice.

Sec. 13. In addition to the regular license fees or taxes imposed upon "public motor carriers of property or of passengers," "contract motor carriers of property or of passengers," and "private motor carriers of property,"

there shall be assessed against and collected from every such carrier a tax of five tenths mill per gross ton mile for the administration of this act and for the maintenance, repair and reconstruction of the public highways. The said gross ton mileage shall be computed: (*a*) The maximum seating capacity of each passenger carrying vehicle shall be estimated at 150 pounds per passenger seat; to this sum shall be added the weight of the vehicle, the total shall then be multiplied by the number of miles operated, and the amount thus obtained divided by 2,000; (*b*) 200 per cent of the rated capacity of each property carrying vehicle plus the weight of the vehicle shall be multiplied by the number of miles the vehicle is operated, and the amount thus obtained divided by 2,000.

Sec. 14. Motor carriers operating under a certificate and having paid their fees for the year 1931 shall receive credit for so much of the fees as have been paid under section 6 of chapter 206 of the Laws of 1925 for the last half of the year 1931.

Sec. 15. Every motor carrier to which this act applies shall keep daily records upon forms prescribed by the commission of all vehicles used during the current month. On or before the 25th day of the month following, they shall certify under oath to the commission, upon forms prescribed therefor, summaries of their daily records which shall show the ton miles traveled during the preceding month, and such other information as the commission may require. The daily records shall be filed and preserved for a period of at least three years, and thereafter until permission for their destruction shall have been given by the commission. Any person who shall wilfully under oath make a false return to the commission shall be deemed guilty of perjury.

Sec. 16. The commission is hereby empowered to administer and enforce all provisions of this act, to inspect the books and documents of all carriers to which this act applies, and to expend such amount of the sum collected hereunder as is necessary for such purposes upon requisition by the commission to the state auditor: Provided, however, The total sum to be expended as provided in this section shall not exceed during the calendar year twenty

per cent of the total gross sum collected under this act. It [fol. 19] shall be the duty of the state treasurer to hold in reserve twenty per cent of all moneys collected hereunder during the calendar year for the purpose of meeting such expenditures.

Sec. 17. On or before the 25th day of each month all motor carriers shall pay to the commission *on* the amount of the fees due from them for the preceding month. If payment is not made on or before said date there shall be added as a penalty a sum equal to one and one-half per cent per month of the amount of the original fee. Said fees and penalties not paid on said date shall constitute a lien upon all the personal property of the delinquent carrier, and also upon the vehicles of all persons leased by it in its business, and thereupon said property and vehicles may be held under warrant issued by the commission and may be sold in accordance with the law applicable to personal property taxes. In addition thereto, such delinquency shall be a ground for the issuance of writ of attachment by any court of record against the carrier, and for the suspension or revocation by the commission of the certificate or license; said suspension or revocation may be ordered after a hearing by the commission held after a notice of not less than five days to all parties interested. The commission shall enforce collection of all fees and penalties provided in this act, and daily remit to the state treasurer the proceeds thereof.

Sec. 18. All moneys received under the provisions of this act shall be distributed: (*a*) For administration and enforcement of the provisions of this act, twenty per cent shall be held by the state treasurer for the use of the public service commission; (*b*) the balance the said treasurer shall place to the credit of the highway fund of the state and it shall become a part thereof.

Sec. 19. Any person who shall operate as any carrier to which this act applies without first obtaining a certificate or license or in violation of any of the terms thereof, or who fails to make any return or report required by this act or by the commission hereunder, or who denies to the commission access to his books or records, shall be guilty of a

misdemeanor and shall be punished as hereinafter provided.

Sec. 20. The commission is empowered to expend such money as may be necessary for the administration and enforcement of this act, but said sum shall not exceed the twenty per cent allowed to the commission in subparagraph (*a*) of section 18 hereof.

Sec. 21. No certificate or license shall be issued by the public service commission to any "public motor carrier of property," "public motor carrier of passengers," "contract motor carrier of property or passengers" or "private motor carrier of property," until and after such applicant shall have filed with, and the same has been approved by, the public service commission, a liability insurance policy in some insurance company or association authorized to transact business in this state, in such reasonable sum as the commission may deem necessary to adequately protect the interests of the public with due regard to the number of persons and amount of property [fol. 20] involved, which liability insurance shall bind the obligors thereunder to pay compensation for injuries to persons and loss of or damage to property resulting from the negligent operation of such carrier. No other or additional bonds or licenses than those prescribed in this act shall be required of any motor carrier by any city or town or other agency of the state.

Sec. 22. The commission shall promulgate and publish in the official state paper, and mail to each holder of a certificate or license hereunder, such regulations as it may deem necessary to properly carry out the provisions and purposes of this act. The commission may at any time, for good cause, suspend, and, upon at least five days' notice to the grantee of any certificate and an opportunity to be heard, revoke or amend any certificate. Upon the commission finding that any public carrier does not give convenient, efficient and sufficient service as ordered, such public carrier shall be given a reasonable time to provide such service before any existing certificate is revoked or a new certificate granted. Any rules promulgated by the commission shall include: (*a*) Every vehicle unit shall be maintained in a safe and sanitary condition at all times.

(*b*) Every operator of a motor vehicle used as a public carrier shall be at least twenty-one years of age; and every operator of other carriers to which this act applies shall be at least sixteen years of age; and all such operators shall be of good moral character and fully competent to operate the motor vehicle under his charge. (*c*) Hours of service for operators of all motor carriers to which this act applies shall be fixed by the commission. (*d*) Accidents arising from or in connection with the operation of carriers shall be reported to the commission in such detail and in such manner as the commission may require: Provided, That the failure to report any such accident within five days after the happening thereof shall be deemed willful refusal to obey and comply with a rule of the commission. (*e*) The commission shall require and every carrier shall have attached to each unit or vehicle such distinctive marking as shall be adopted by the commission.

Sec. 23. Every carrier to which this act applies and every person who violates or procures, aids or abets in the violating of any provision of this act, or who fails to obey any order, decision or regulation of the commission, or who procures or aids or abets any person in his failure to obey such order, decision or regulation, shall be deemed guilty of a misdemeanor and upon conviction shall be punished by a fine of not exceeding $500. The inspectors designated by the commission shall have all the lawful powers of peace officers to enforce this act in any county or city of this state.

Sec. 24. It shall be the duty of the county attorneys to prosecute all violations of this act.

Sec. 25. Certificates issued to public carriers by the commission under the authority of chapter 206 of the Laws of 1925 shall remain in effect hereunder.

[fol. 21] Sec. 26. All parts of chapter 206 of the Laws of 1925 and chapter 222 of the Laws of 1929 (being sections 66-196 to 66-1,107, inclusive, of the 1930 Supplement to the Revised Statutes of Kansas, 1923), inconsistent or in conflict with this act are hereby repealed.

Sec. 27. This act shall take effect and be in force from and after July 1, 1931, and publication in the statute book.

[File endorsement omitted.]

[fol. 22] IN UNITED STATES DISTRICT COURT

TEMPORARY RESTRAINING ORDER—Filed Sept. 22, 1931

Now on this 22nd day of September, 1931, there came on for hearing the verified bill of complaint of petitioners, Continental Baking Company, a corporation, General Baking Company, a corporation, Schulze Baking Company, a corporation, and Carl Wilke, doing business as the Wilke Baking Company, praying for the immediate issuance of a restraining order directed to Harry H. Woodring, as Governor of the State of Kansas, Roland Boynton, as Attorney General of the State of Kansas, Jesse W. Greenleaf, Thurman Hill and Charles W. Campbell as members of the Public Service Commission of the State of Kansas, and their officers, agents, representatives and employees, restraining them from enforcing Chapter 236 of the Laws of 1931 of the State of Kansas, the same being Senate Bill 387, which imposes certain restrictions, a license fee, reports, returns and other obligations therein set forth in the operation of their motor vehicles as defined by said act in the delivery of their personal property as private motor carriers of property as defined by said act in the State of Kansas, and after due consideration the court finds that the enforcement of said act and law and the manner of enforcement thereof should be restrained pending a hearing upon an application for a temporary injunction, and the petitioners' prayer for a restraining order should be granted.

It is therefore ordered, adjudged and decreed that the defendants, Harry H. Woodring, as Governor of the State of Kansas, Roland Boynton, as Attorney General of the State of Kansas, Jesse W. Greenleaf, Thurman Hill and Charles W. Campbell, as members of the Public Service [fol. 23] Commission of the State of Kansas, their officers, agents and all persons acting for them in concert with them be and they are hereby each and every one of them restrained from enforcing the aforesaid law and act as against Continental Baking Company, General Baking Company, Schulze Baking Company, and Carl Wilke doing business as the Wilke Baking Company, or their agents, servants or employees, and from arresting, trying or causing

to be arrested and tried under said laws and act any employee, representative or agent of said Continental Baking Company, General Baking Company, Schulze Baking Company and Carl Wilke doing business as the Wilke Baking Company.

Be it further ordered that the petitioners give security in the sum of One Thousand ($1,000) Dollars to be approved by the Clerk, conditioned upon the payment of such costs and damages as may be incurred by any person wrongfully enjoined or restrained hereby, this restraining order to be effective upon the giving of said security.

Be it further ordered, adjudged and decreed that the matter of the issuance of a temporary injunction be and it is hereby set for hearing on the 9th day of October, 1931.

Richard J. Hopkins, Judge.

[File endorsement omitted.]

[fols. 24 & 25] Bond on restraining order for $1,000, approved and filed September 22, 1931, omitted in printing.

[fol. 26] IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS BILL OF COMPLAINT—Filed Sept. 24, 1931

Comes now the undersigned defendants and say that said bill of complaint ought to be dismissed because it appears upon the face of the bill of complaint.

1. That the said bill of complaint does not make out or state such a cause as to entitle the complainants, or any of them, to the relief prayed for, or any relief.

2. That it is not shown from the averments of the said bill of complaint that the statutes challenged are as a matter of law in contravention of any designated provision of a federal constitution, but on the contrary it appears from the averments of the said bill of complaint that the statutes challenged are as a matter of law valid and proper exercise by the State of Kansas of its police power.

3. That the allegations of fact in the said bill of complaint are not suffcient to show that the statutes challenged are in contravention of the power of Congress to regulate commerce among the several States; nor do the allegations of the bill show any real burden imposed by said acts on interstate commerce; nor show any denial of right or deprivation of property as to the complainants, or any of them.

Wherefore defendants pray that the bill of complaint be dismissed and that the costs be taxed to the plaintiffs.

Roland Boynton, Attorney General; Walter Griffin, Assistant Attorney General; Chas. W. Steiger, E. H. Hatcher, Attorneys for the Public Service Commission.

[File endorsement omitted.]

[fol. 27] IN UNITED STATES DISTRICT COURT

NOTICE OF HEARING MOTION TO DISMISS—Filed Sept. 24, 1931

To the above-named plaintiffs and their attorneys of record:

You and each of you are hereby notified that the defendants in the above entitled cause will on Friday, October 9, 1931, at 10 o'clock A. M., or as soon thereafter as the same may be heard, call up for hearing before the three judge court, to be assembled by Honorable Richard J. Hopkins in the court room of the Federal Building at Topeka, Kansas, their motion to dismiss the bill of complaint filed by you in the above entitled cause, a copy of which motion is marked Exhibit "A", attached hereto and made a part hereof.

Roland Boynton, Attorney General; Walter Griffin, Assistant Attorney General; Chas. W. Steiger, E. H. Hatcher, Attorneys for the Public Service Commission.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

REQUEST FOR CONVENING THREE-JUDGE COURT—Filed Sept. 29, 1931

To the Honorable Richard J. Hopkins, of the District Court of the United States for the District of Kansas, First Division:

Comes now the defendant in the above entitled action and requests that a three judge court be convened on the 9th day of October, 1931, at the hour of 10 A. M., or as soon thereafter as the same may be heard, at the Federal Building in Topeka, Kansas, for the purpose of hearing the motion of the defendant to dismiss the bill of complaint filed in the above entitled cause as by statute in such case made and provided.

[fol. 28] Roland A. Boynton, Attorney General; Walter Griffin, Assistant Attorney General; Chas. W. Steiger, E. H. Hatcher, Attorneys for the Commission.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

PETITIONERS' CONSENT TO REQUEST FOR CONVENING THREE-JUDGE COURT—Filed Oct. 2, 1931

To the Honorable Richard J. Hopkins, of the District Court of the United States for the District of Kansas, First Division:

Come now the Petitioners in the aforesaid case and consent to the request of defendants heretofore filed herein that a three judge court be convened on the 9th day of October, 1931, at the hour of 10 A. M. or as soon thereafter as the same may be heard at the Federal Building in Topeka, Kansas, for the purpose of hearing motion of defendants to dismiss the bill of complaint filed in the above entitled cause.

Charles R. Wilke, John C. Grover, Attorneys for Petitioners.

[File endorsement omitted.]

[fol. 29] IN UNITED STATES DISTRICT COURT

ORDER DESIGNATING JUDGES AND FIXING DATE OF HEARING OF THREE-JUDGE COURT—Filed Oct. 2, 1931

Petitioners, Continental Baking Company, a corporation, General Baking Company, a corporation, Schulze Baking Company, a corporation, and Carl Wilke, doing business as the Wilke Baking Company, having presented to the undersigned Judge their bill of complaint to enjoin, set aside, annul and suspend Chapter 236 of the Laws of Kansas, 1931, and it appearing that defendants have entered their appearance, and that motion has been made and consented to for the determination by three judges of said cause, and that said bill of complaint is one which requires, under the law, hearing and determination by three judges, one of whom shall be a Circuit Judge, the undersigned, after taking counsel with the Presiding Judge of the United States Circuit Court of Appeals for the Tenth Circuit, and being advised by him that the Honorable George T. McDermott, one of the Judges of Said Circuit Court, had been designated as the Circuit Judge to hear and determine said application, sitting with two other Judges as required by law;

It is therefore ordered that the hearing of the bill of complaint of petitioners Continental Baking Company, a corporation, General Baking Company, a corporation, Schulze Baking Company, a corporation, and Carl Wilke, doing business as the Wilke Baking Company, be and the same is hereby set for hearing October 10th, 1931, at Topeka, Kansas, and that such hearing be had before the Honorable George T. McDermott, Circuit Judge, the Honorable Franklin E. Kennamer, District Judge, and the undersigned, District Judge.

Richard J. Hopkins, District Judge.

[File endorsement omitted.]

[fol. 30] IN UNITED STATES DISTRICT COURT

NOTICE OF HEARING BEFORE THREE-JUDGE COURT—Filed Oct. 3, 1931

To the above-named defendants and their attorneys of record:

You and each of you are hereby notified that the Honorable Richard J. Hopkins of the District Court of the United States of the District of Kansas, First Division, has set the above and foregoing case for hearing before a three judge court at the court room of the Federal Building in Topeka, Kansas, on Saturday, October 10th, 1931, at 10 o'clock A. M. or as soon thereafter as the same may be heard.

Charles R. Wilke, John C. Grover, Attorneys for Petitioners.

Received copy of the above and foregoing notice this 3rd day of October, 1931.

Roland Boynton, Walter Griffin, Chas. W. Steiger, E. H. Hatcher, Attorneys for Defendants.

[File endorsement omitted.]

[fol. 30½] IN UNITED STATES DISTRICT COURT

ORDER OF SUBMISSION—Filed Oct. 10, 1931

Now on this 10th day of October, 1931, comes on for hearing before Hon. Geo. T. McDermott, United States Circuit Judge and Hon. F. E. Kennamer and Hon. Richard J. Hopkins, District Judges, Defendants' Motion to Dismiss the Bill of Complaint herein; Complainants appearing by R. L. Stephens, Charles R. Wilke and John C. Grover, their attorneys; Defendants appearing by Walter T. Griffin, Assistant Attorney General for the State of Kansas, and Chas. W. Steiger and E. H. Hatcher, Attorneys for the Public Service Commission of the State of Kansas, and the Court having heard the arguments of counsel for the respective parties, takes said matter under advisement, with leave to

the parties to file their briefs; thereupon Complainants filed their brief and leave is given to Defendants to file their brief within twenty days from this date and to serve copies on counsel for complainants, and complainants to have ten days thereafter to file their Reply Brief, and thereupon said matter shall be taken as submitted; the restraining order heretofore issued to remain in effect pending the decision on the motion.

Geo. T. McDermott, Judge.

[File endorsement omitted.]

[fol. 31] IN UNITED STATES DISTRICT COURT

Appearances:

For Petitioners: Mr. R. L. Stephens, Mr. Charles R. Wilke, Mr. John C. Grover.

For Defendants: Mr. Roland Boynton, Mr. Walter Griffin, Mr. Chas. W. Steiger, Mr. E. H. Hatcher.

Before McDermott, Circuit Judge, and Kennamer and Hopkins, District Judges

MEMORANDUM OPINION—Filed Dec. 15, 1931

McDERMOTT, Circuit Judge, delivered the opinion of the court.

Chapter 236, of the Laws of 1931, lays a special tax, based on truck capacity and mileage, upon carriers which carry for hire (public and contract carriers) and upon those who are engaged in the transportation by motor vehicle of property sold in furtherance of any commercial enterprise (private carriers). Such taxes must be used for the maintenance, repair and construction of public highways, [fol. 32] and the administration of the act. It requires a public carrier to procure a certificate of convenience before doing an intrastate business; is requires all carriers to procure a license, and to carry liability insurance. It authorizes the public Service Commission to promulgate regulations looking to the safe operation of the vehicles of all carriers. Certain carriers are exempted from the act.

The plaintiffs are "private motor carriers of property" as the same are defined by the act; they operate bakeries both within and without the State of Kansas, and use the highways of Kansas to deliver their products to customers within and beyond a radius of 25 miles from the corporate limits of cities of the state. The plaintiffs seek to enjoin the enforcement of the statute on the ground that it is arbitrary and discriminatory, and that it compels private carriers to assume the burdens of common carriers. A motion of the defendants to dismiss the bill for want of equity is now for decision.

A similar attack was made upon this statute by a "contract carrier", and the statute was held to be good as against that attack by this court, Judges Phillips, Symes and Hopkins sitting. Louis v. Boynton, et al., unreported. We will adhere to the rulings of that court, as far as pertinent, not only because we agree with them, but for the more fundamental reason that courts of coordinate jurisdiction sitting in the same district, must not attempt to overrule the decisions of each other, except for the most cogent reasons. This rule, and its careful observance, are, to use the words of Judge Walter H. Sanborn, "essential to the prevention of unseemly conflicts, to the speedy conclusion of litigation, and to the respectable administration [fol. 33] of the law, especially in the national courts, where many judges are qualified to sit at the trials, and are frequently called upon to act in the same cases." Plattner Implement Co. v. International Harvester Co. (C. C. A. 8) 133 F. 376; Shreve v. Cheesman (C. C. A. 8) 69 F. 785; Boatmen's Bank v. Fritzlen (C. C. A. 8) 135 F. 650.

The State of Kansas has constructed at great expense a system of improved highways. These have been built in part by special benefit districts, and in part by a tax on gasoline sold in the state, and by license fees exacted of all resident owners of automobiles. These public highways have become the roadbeds of great transportation companies, which are actively and seriously competing with railroads which provide their own roadbeds; they are being used by concerns such as the plaintiffs for the daily delivery of their products to every hamlet and village in the state. The highways are being pounded to pieces by these great trucks which, combining weight with speed, are making the

problem of maintenance well-nigh insoluble. The legislature but voiced the sentiment of the entire state in deciding that those who daily use the highways for commercial purposes should pay an additional tax. Moreover, these powerful and speedy trucks are the menace of the highways. That those who use the highways, as the plaintiffs use the highways, are subject to regulation by the state to insure the safety of others on the highways, admits of no dispute. It is likewise settled that such users, although nonresidents and although engaged exclusively in interstate commerce, may be required to contribute to their cost and upkeep. The highways are public property. The amount of the charges and the method of collection are for the state to [fol. 34] determine, so long as they are reasonable and conform to some fair and practical standard. Carley & Hamilton v. Snook, 281 U. S. 66; Bekins Van Lines v. Riley, 280 U. S. 80; Clark v. Poor, 274 U. S. 554; Packard v. Banton, 264 U. S. 140; Kane v. New Jersey, 242 U. S. 160; Hendrick v. Maryland, 235 U. S. 610; Note, 68 A. L. R. 200. We are advised that all of the states of the union, excepting five, have passed statutes undertaking to regulate such special use of their highways and to exact special compensation therefor.

The constitutional questions presented cannot be decided until the statute has been construed. This statute has not yet been construed by the state courts; nor are we aided by any administrative interpretation of the department charged with its enforcement. The statute was construed in Louis v. Boynton, supra, as far as was necessary for the determination of that case; but there remains for this court to construe several sections of the statute.

As in the case of most legislation which is the subject of wide interest and which is amended on the floor and in conference, many questions of construction are raised. Counsel for the plaintiffs make many suggestions which would improve the draftmanship of the bill, as doubtless they will be able to do as to any bill that may be later enacted. We are not aided in our efforts to construe the law by the hypothetical absurdities which are suggested by counsel and which have come to be the conventional method of presenting constitutional questions, for, as was said by the Supreme Court of Oregon in State v. Kozer,

116 Ore. 581, 242 Pac. 620, the constitutionality of a statute cannot be tested by isolated cases conjured up by fertile imagination; it must be tested by

[fol. 35] "Its general application to the classes affected, and not to certain individuals belonging to such classes. Exact equality is not possible. Practical equality is constitutional equality. The human mind has not yet been able to devise any scheme of taxation which will operate with unerring certainty and equality to all situations which may arise. Southwestern Oil Co. v. Texas, 217 U. S. 114; Bell's Gap R'd Co. v. Pennsylvania, 134 U. S. 232."

First looking at the statute as a whole: It is immediately observed that it draws no distinction between residents and nonresidents. Next, it discloses a general intent to levy a reasonable tax for the use of its highways by those who habitually use the highways for business purposes. It divides such users into two general classes, the so-called "public" and "contract" carriers, who are engaged in the business of transportation of property by motor vehicle for hire; and "private" carriers, to which class the plaintiffs belong, who are defined to include "any person engaged in the transportation by motor vehicle of property sold or to be sold by him in furtherance of any private commercial enterprise." The act requires intrastate public carriers to obtain a certificate of convenience and necessity, and provides for the regulation of their charges for services. It requires that private carriers shall apply for a license and furnish certain information, and that upon the receipt of such information and compliance with the regulations, that the license shall be issued. It requires that both public and private carriers conform to certain regulations concerning the safety of the operation of their vehicles, and that both shall provide a bond to indemnify the public against injury. The statute clearly discloses two general plans, one for the control of public carriers, and the other for the control of private carriers. Reading the statute as a whole, there is no difficulty in arriving at the [fol. 36] conclusion that the legislature intended to confine its control of private carriers to matters of taxation and of public safety. The authorities already cited amply sustain the power of the state over all carriers in these two re-

spects. Two principal questions are presented. First is whether certain exemptions contained in Section 2 of the act are so arbitrary and discriminatory that the entire act must fall; and second, whether the act imposes upon private carriers duties and obligations which can only lawfully be imposed upon public carriers. Frost v. Commission, 271 U. S. 583; Smith v. Cahoon, 283 U. S. 553. But see, Stevenson v. Binford (S. D. Texas, 3-Judge Court) decided October 26, 1931.

We will treat first the question of exemptions. Section 2 of the act provides:

"That this act shall not apply to motor carriers who shall operate wholly within any city or village of this state, or private motor carriers who operate within a radius of twenty-five miles beyond the corporate limits of such city, or any village, nor to the transportation of livestock and farm products to market by the owner thereof or supplies for his own use in his own motor vehicle; or to the transportation of children to and from school."

There can be no serious question as far as the exemption applies to those vehicles operating wholly within any city or village of the state. As to private carriers, this is primarily a taxing statute, and since city streets are neither constructed nor maintained by the state, there is no reason why the state should exact a charge for vehicles which do not use the state highways; nor is there as much occasion for the state to enact statutes looking toward their safe operation in localities where such operation may be con- [Vol. 37] trolled by city ordinance. Nor can there be any serious question about the exemption as to the transportation of children to and from schools. This public agency can be fairly exempted from taxation for the same reason that municipal bonds are; the question of the safe operation of such vehicles can be properly left to the school authorities who are directly responsible therefor. Louis v. Boynton, supra, and many state decisions collected in 68 A. L. R. 194.

It is strenuously argued that the legislature has no power to exempt vehicles used in the transportation of livestock and farm products to market by the owner thereof, or supplies for his own use in his own motor vehicle. It is

said that flour mills and packing houses might employ a fleet of trucks and send them to the farm to transport wheat and livestock to the mill or the packing house. They might, but they don't. The legislature knew that as a matter of fact farm products are transported to town by the farmer, or by a nonexempt "contract carrier" employed by him. The legislature knew that as a matter of fact, the use of the highways for the transportation of farm products by the owner is casual and infrequent and incidental; farmers use the highways to transport their produtcs to market ordinarily but a few times a year. The legislature rightly concluded that the use of the highways for carrying home his groceries in his own automobile is adequately compensated by the general tax imposed on all motor vehicles. It is strenuously urged that Smith v. Cahoon, 283 U. S. 553, is contrary. The statute there involved dealt only with carriers engaged in the business of transportation for hire between fixed termini or over regular routes. That statute undertook to exempt from its operation such public carriers as were engaged in the business of transporting farm products. The Supreme Court held that there was no [fol. 38] reasonable ground for distinguishing between two public transportation companies, one of which was engaged in transporting farm products for hire, and another of which was engaged in transporting other products for hire. But because there is no rational distinction between two public carriers because of the nature of the products carried, it does not follow that no rational distinction may exist between two private carriers. Whatever may be the metaphysics of the situation, it is a fact that there is an actual distinction between carriers in the position of the plaintiffs, who operate fleets of trucks in the conduct of their business and who use the highways daily in the delivery of their products to their customers, and a farmer who hauls his wheat or livetsock to town once or twice a year. As was said by this court in Louis v. Boynton, supra, there is a distinction between those who use the highways but casually, and those who use them habitually and continually. In Carley & Hamilton v. Snook, 281 U. S. 66, the court held that the state might exempt altogether vehicles weighing less than 3,000 pounds, although their loaded weight may be much more than vehicles not exempt.

The court said that the tax might be laid upon vehicles according to their propensities to injure or destroy the highways, "and may exempt those with respect to which this tendency is slight or non-existent." And in Bekins Van Lines v. Riley, 280 U. S. 80, the court sustained a statute directed at common carriers alone, on the ground that their use of the highways would be regular and frequent and expose the public to dangers exceeding those consequent upon the occasional movements of other carriers. Alward v. Johnson, 282 U. S. 509, is to the same effect. We think the legislature had a right to take into consideration the fact that as business is now conducted, the transportation [fol. 39] of livestock and farm products to market by the owners occasions but a casual and infrequent use of the highways, while the transportation of the finished product to the ultimate consumer is accomplished generally by the sellers, and that their use of such highways is habitual and constant.

When the legislature acts within the scope of its legislative power, when no facts are disclosed as to the reasons which actuated the legislation, the presumption of constitutionality stands unless no fair reason can be ascribed for the legislative action. Hardware Dealers Ins. Co. v. Glidden,—U. S.—(Decided November 23, 1931); O'Gorman v. Hartford Ins. Co., 282 U. S. 251; Standard Oil Co. v. Marysville, 279 U. S. 582. That a legislative classification should stand, "if any state of facts reasonably can be conceived that would sustain it"; that the burden is on the assailant to show that the classification is "essentially arbitrary"; that the legislature has a "wide scope of discretion" in classification; that "mathematical nicety" is not required, and that "some inequality in practice" is not fatal, see Lindsley v. Natural Carbonic Co., 220 U. S. 61, 78; Tax Commissioners v. Jackson, 283 U. S. 527, 537; Brown-Forman v. Kentucky, 217 U. S. 563, 573; Munn v. Illinois, 94 U. S. 113, 132. It is abundantly settled that the legislature may consider the difficulties of administration in the enactment of statutes. In Purity Extract Co. v. Lynch, 226 U. S. 192, it was held that the difficulties besetting the adminstration of a law was sufficient to authorize the placing of an innocent article within a proscribed class. See, also, Ruppert v. Caffey, 251 U. S. 264, 283; Hebe Co. v. Shaw, 248

U. S. 297, 303; Euclid v. Ambler Co., 272 U. S. 365, at page 389; Tyler v. United States, 281 U. S. 497, 505

[fol. 40] One reason for this exemption, and the exemption next discussed, immediately occurs to us. It is a matter of common knowledge that one of the most serious problems connected with legislation such as this is the problem of administration and the cost thereof. One of the reasons for exempting small incomes from taxation was the cost and expense of collection. If laws are placed upon statute books, they should be enforced. The problem of enforcing such statutes as the one now before us is not a simple one, and the cost of collection of the tax is an item that must be considered. It is a well known fact that business concerns, such as plaintiffs, keep books, and it is comparatively simple to ascertain the mileage of their trucks. A different problem is presented if an effort is made to require a record of the mileage of the trucks of farmers and others incidentally using the highways. It is undoubtedly true that it would require a veritable army of inspectors if a sincere effort was made to ascertain the mileage of every farmer's truck in Kansas. The cost of collection might exceed the tax. We are not prepared to say that the legislature, which presumably has considered all of these elements and has made a serious effort to meet this problem, has exceeded its powers in exempting such casual uses from the operation of this law.

A more troublesome question concerning exemptions is that provision which exempts private carriers "who operate within a radius of 25 miles beyond the corporate limits of such city." The plaintiffs urge that this is so uncertain and indefinite as to be entirely unenforceable, and present in support of that statement several interpretations which border on the fantastic, one of such interpretations being that if a private carrier starts on an un-

[fol. 41] interrupted journey across the state, that it passes through a series of exempt circles of 25 mile radii, and becomes exempt from taxes whenever it is within one of those circles, and taxable as soon as it passed without. The practical result of this construction would be to exempt all private carriers from tax, for it is quite doubtful whether there is any highway in Kansas that is not within 25 miles

of some city or village. Manifestly, the legislature did not intend that. "A literal application of a statute which would lead to absurd consequences is to be avoided whenever a reasonable application can be given which is consistent with the legislative purpose." United States v. Ryan, — U. S. — (decided November 23, 1931); United States v. Katz, 271 U. S. 354. Counsel for the Public Service Commission suggests that the law means that a nonresident has a 25 mile exemption radius from the actual point of his entry in the State of Kansas, or from his established place of business in the state. We cannot agree entirely with this construction. Until we had the benefit of the ingenious argument of counsel for the plaintiffs, we had little doubt as to the actual intent of the legislature in enacting this exemption. The legislature very properly intended to exempt those vehicles which regularly and habitually operate within the limits of the city, such as the delivery trucks of the retail store. The legislature realized that around every city of the state there was a penumbra of town that was outside the city limits; that in their daily routine these city delivery trucks cross the city limits repeatedly in going back and forth into these outlying additions. In so doing, the trucks use the state improved highways but slightly, for the streets of these outlying additions are not generally a part of the state system. Furthermore, the practical difficulty of keeping track of the mileage of such delivery trucks as they cross back [fol. 42] and forth is well-nigh insuperable; the revenue to be gained from such use would be insignificant and the cost of collection large. The records disclose that when the bill was originally presented, its limit was fixed at three miles which would take in the outlying trade territory of most of the cities, although there are some that extend beyond that. There was some support for the flat 50 miles exemption contained in the North Carolina statute. The result was the compromise contained in this section.

We have little doubt of the power of the legislature to add to the city limits this twilight zone of trade territory both because of the problems of administration presented, and because of the fairness of it; and as long as residents and nonresidents are treated alike within this twilight zone, we think the legislature did not exceed its powers. In our

opinion the decision of the Supreme Court of the United States in Clarke v. Maxwell, 282 U. S. 811, is conclusive. That case involved the North Carolina statute which levied a tax on all carriers for hire which operated between fixed termini that were more than 50 miles apart. The plaintiff in that case was a carrier which operated between termini that were at times less than 50 miles apart, and at times more than 50 miles apart. He attacked the law on the ground that there was an aribitrary discrimination in favor of carriers who used the highways for less than 50 miles and as against those who used the highways for more than 50 miles; and made many of the same arguments that are presented here, to the effect that the wear and tear on the highways is quite as serious where a dozen trucks operated less than 50 miles as one truck that operated 55 miles. The Supreme Court of North Carolina sustained the tax, holding that since all were treated alike within and without the 50 mile zone, the legislature had a right to say that the [fol. 43] privilege of operating a truck for more than 50 miles was greater than the privilege of operating a truck for less than that distance; and that such a distinction was sufficient to support the classification. Clarke v. Maxwell, 197 N. C. 604. The Supreme Court of the United States affirmed without opinion. Clarke v. Maxwell, 282 U. S. 811. If the legislature has the power to exempt a class that uses the highways for less than 50 miles, it has a right to exempt a class that uses the highways within a radius of 25 miles. Both exempt a local use.

A case squarely in point is that of State v. Kozer, 116 Ore. 581, 242 Pac. 621, where the Oregon statute exempted vehicles which operated exclusively within the boundaries of incorporated cities or towns of the State of Oregon or within five miles beyond the boundaries of such cities or towns" and also exempted trucks "used exclusively in delivery to market of the products of husbandry by the grower and owner thereof." The same attack was made there as is made here. The Supreme Court of Oregon sustained the law saying that it was of course reasonable to exempt motor vehicles used only in cities, and as to the five mile radius said:

"Business houses are occasionally obliged to deliver articles of commerce to customers beyond corporate limits,

and the Legislature, in the exercise of its discretion, granted to this class the privilege of so using the highways beyond corporate limits within a limited radius. This concession is not unreasonable in view of the fact that our wonderful system of highways could not have been built nor maintained were it not for the thousands of owners of commercial vehicles whose places of business are in cities and who seldom use the highways, yet pay their just portion of this public burden."

Of course, 25 miles is further than 5 miles; and it does seem that a 25 mile exemption, even for facility of administration, is pretty far. But if the state has the power to create this penumbra about the city, the question of the dis-
[fol. 44] tance must be left to the legislature unless it is clearly arbitrary. The language of Justice Holmes, while in a dissenting opinion, is an apt statement of a familiar principle of law:

"When a legal distinction is determined, as no one doubts that it may be, between night and day, childhood and maturity, or any other extremes, a point has to be fixed or a line has to be drawn, or gradually picked out by successive decisions, to mark where the change takes place. Looked at by itself without regard to the necessity behind it the line or point seems arbitrary. It might as well or nearly as well be a little more to one side or the other. But when it is seen that a line or point there must be, and that there is no mathematical or logical way of fixing it precisely, the decision of the legislature must be accepted unless we can say that it is very wide of any reasonable mark."

Louisville Gas Co. v. Coleman, 277 U. S. 32, 41.

A recent case that distinctly recognizes the propriety of a classification predicated upon difficulty of administration and accounting is Railway Companies v. Interstate Commerce Commission, — U. S. — (decided November 23, 1931). There railroads of less than 100 mile length were exempted from certain features of the Car-Rental order of the Interstate Commerce Commission; this exemption was sustained because it relieved the small carriers "from the burden of keeping account of a multitude of separate

per diem charges, and reporting them separately to the various trunk lines." It was noted that the longer lines maintained large accounting forces. So here, the bakeries keep books; the farmers do not. Long hauls are easily recorded, and the tax will pay for the inspection; but the burden of computing and collecting a tax from the delivery truck which occasionally crosses the city limits, is disproportionate to the tax involved.

[fol. 45] A Texas statute, approved June 11, 1931, regulated the length and width of trucks, but exempted implements of husbandry, well-drilling and highway construction machinery, trucks operating exclusively within a city, and all vehicles engaged in carrying property from the point of origin to the nearest common carrier loading point, and from such loading point to destination. These exemptions were assailed before the United States District Court of Texas, three judges sitting. The statute was construed by that court as exempting farm machinery only as it moved from field to field, and as so construed, sustained the validity of that and all other exemptions. The origin-to-common carrier exemption was sustained because of the short haul involved. Sproles v. Binford, 52 F. (2d) 730, 734. In 1887, the State of New York passed a statute prohibiting the use of stoves in passenger cars, but exempted railroads of less than 50 miles in length. The Supreme Court of the United States denied the contention that such exemption resulted in an arbitrary classification. New York, etc., Railroad v. New York, 165 U. S. 628.

While the act is primarily a taxing statute, it does contemplate regulations looking to the public safety. The exemption of the farmer from such regulations can be sustained on the familiar ground that he makes but casual use of the highways for transportation of his products. The 25 mile exemption is probably sustainable on the ground that the trucks exempted are domiciled in and generally use the city streets; indeed they must use them to get to the city limits; and such trucks are subject to the control of city authorities in these respects. Again, plaintiff's trucks are exempted within this zone as are all others like situated.

But it us urged that the statute is not susceptible of this construction; it is said that the statute exempts any carrier

[fol. 46] which operates within a radius of 25 miles beyond the city limits. We think that this phrase must be read in connection with the first phrase of the sentence. The first phrase exempts all carriers who operate wholly within the city limits; a distinction was then intended to be drawn in favor of private carriers who operated within the 25 mile zone outside of the city. So the phrase in question was inserted. It is also to be observed that the phrase uses the expression "within a radius." The use of the word "radius" indicates a center. That center must be the city. What city? The statute says "such city". "Such" refers back to motor carriers "who operate wholly within any city." We think a fair construction of the statute is that there is exempted private carriers who have an established place of business within a city, be they resident or nonresident, and who use that city as a center of the operations of that vehicle. The bill alleges that one of the nonresident corporations maintains bakeries in several cities of the state. Connected with those bakeries are delivery trucks. Such trucks may be said to be domiciled in that city. Such trucks may operate in and about that city, within a radius of 25 miles, exempt from the tax. Nor is it necessary that a carrier should have a bakery in the city. We are of the opinion that if a bakery were operated in Kansas City, Missouri, and domiciled trucks in the city of Topeka, for delivery in Topeka and environs, that the bread could be hauled from Kansas City, Missouri, to Topeka, by trucks (such trucks paying the tax) but that it could then be turned over to the domiciled trucks, which could deliver their bread in Topeka and within the 25 mile radius, exempt from the tax. Although the language is not entirely apt, we think it can and should be construed as intending to exempt from the tax those carriers who either have an established place of business or an established [fol. 47] delivery point, with trucks domiciled in any city, and that such trucks may operate in that city and within a 25 mile radius free of any tax; if such a truck goes beyond the 25 mile limit, we agree with the construction of the Commission, that only the excess is taxable. It is true that sometimes that excess would be difficult of ascertainment; but that is a legislative problem. It is our duty to construe the law so as to make it constitutional if it is

fairly susceptible of such a construction. So construed we believe the exemption not to be so arbitrary as to trespass upon the constitutional limitations. This conclusion is strongly buttressed by the fact that the nonresident plaintiffs are treated exactly like residents in that they may domicile a truck in any city and be entitled to the exemption.

The point urged by counsel for the plaintiffs that the 25 mile zone is larger around a large city than around a small city, is mathematically but not legally sound. The Supreme Court of the United States in Railway Company v. Interstate Commerce Commission, supra, met a similar argument by the simple statement that it is not enough to show that "mathematical accuracy in the adjustment of a burden may not be attained."

The next claim is that Section 5 of the Act, which is set forth in the margin,[1] imposes upon private carriers the [fol. 48] duties and obligations of common carriers. If this is true, the legislature has probably exceeded its power, although Circuit Judge Hutcheson, speaking for a three-judge court, may have otherwise held. Stevenson v. Binford, supra. But we do not so read Section 5. The first

---

[1]Sec. 5. The public service commission is hereby vested with power and authority and it shall be its duty to license, supervise and regulate every public motor carrier of property or of passengers in this state and to fix and approve reasonable maximum or minimum or maximum and minimum rates, fares, charges, classifications and rules and regulations pertaining thereto. And the public service commission is hereby vested with power and authority and it shall be its duty to license, supervise and regulate every public motor carrier of property or of passengers, contract motor carrier of property or of passengers and private motor carrier of property in the state and to regulate and supervise the accounts, schedules, service and method of operation of same; to prescribe a uniform system and classification of accounts to be used; to require the filing of annual and other reports and any other data; and to supervise and regulate "public motor carriers of property or of passengers," "contract motor carriers of property or of passengers" and "private motor car-

sentence of Section 5 deals solely with public carriers and gives to the Commission the power to fix its rates. The second sentence deals with both the public and private carriers and gives the Commission power, not over rates or charges, but over their bookkeeping, and their relations to the traveling and shipping public. If this tax is to be collected, some books of account must be kept by the carriers that will reflect the mileage of their trucks. The legislature has power to authorize the Commission to require such bookkeeping and such reports as will accurately reflect the mileage of the trucks. It is not to be assumed that the Commission will go further than this, with reference to private carriers. If it does go further, the regulation, and not the statute, would be invalid. The same sentence refers to the "method of operations of same," and the last phrase authorizes the Commission to regulate the carriers in their relations with the traveling and shipping public. As far as private carriers are concerned at least, this power is limited to such regulations as will protect other [fol. 49] travelers and shippers on the highway, and protect the highways themselves. Under this power it can control, within reasonable limitations, the width, the length, the height, the weight, the speed, the lights, the brakes, on these large and speedy trucks which continually use the highways. Such regulations, and others that may occur to the Commission, are appropriate, for the protection of travelers and shippers who are also entitled to the use of the highways. So construed, the authority granted is well within the police powers of the state. The last sen-

---

riers of property" in all matters affecting the relationship between such "public motor carriers of property or of passengers" "contract motor carriers of property or of passengers" and "private motor carriers of property" and the traveling and shipping public. The public service commission shall have power and authority by general order or otherwise to prescribe reasonable and necessary rules and regulations governing all such motor carriers. All laws relating to the powers, duties, authority and jurisdiction of the public service commission over common carriers are hereby made applicable to all such motor carriers except as herein otherwise specifically provided."

tence deals solely with common carriers and extends the laws relating to common carriers to "all such motor carriers," which by the simplest rules of grammatical construction, refers to public and not to private carriers.

It is claimed that Section 8 is invalid, in that it requires a private carrier to procure a license. Section 8 should be read in connection with Section 7, which forbids public carriers to operate an intrastate business without "a certificate of convenience and necessity." Section 8 deals with a license and not with a certificate of public convenience. It makes it mandatory upon the Commission to issue the license upon receipt of certain information and upon payment of the fees required. Every automobile driver in the state of Kansas must have a license. Such Section requires that—

"An application shall be made to the public service commission in writing stating the ownership, financial condition, equipment to be used and physical property of the applicant, and such other information as the commission may request."

The ownership and financial condition of the applicant is a matter of interest to the Commission in connection with the collection of the tax; the question of the equipment and physical property connected therewith is of interest to the Commission in the matter of public safety, particularly [fol. 50] with reference to the condition of steering gears and brakes. Until the Commission requires information which has no reasonable bearing on the ability of the applicant to pay the tax, or has no relation to the safety of his equipment, the plaintiff's rights have not been invaded.

The next section under attack is Section 21 which is copied in the margin.[2] This court, in Louis v. Boynton,

[2] Sec. 21. No certificate or license shall be issued by the public service commission to any "public motor carrier of property," "public motor carrier of passengers," "contract motor carrier of property or passengers" or "private motor carrier of property," until and after such applicant shall have filed with, and the same has been approved by, the public service commission, a liability

supra, construed this section as not requiring security for passengers or cargoes carried, but only to protect third persons from injuries to their persons or property. So construed, the section is clearly within the powers of the state. That no such bond is required of automobile owners generally is not arbitrary. Plaintiffs complain that the last sentence of Section 21 provides that no city shall require any additional bond. It seems to be fair to say that if one bond is given, another shall not be required. But plaintiffs are not hurt by this. They can give all the bonds they wish, without let or hindrance.

[fol. 51] The next section attacked is Section 22 which is in the margin.[3] This section deals in part with public

---

insurance policy in some insurance company or association authorized to transact business in this state, in such reasonable sum as the commission may deem necessary to adequately protect the interests of the public with due regard to the number of persons and amount of property involved, which liability insurance shall bind the obligors thereunder to pay compensation for injuries to persons and loss of or damage to property resulting from the negligent operation of such carrier. No other or additional bonds or licenses than those prescribed in this act shall be required of any motor carrier by any city or town or other agency of the state.

[3] Sec. 22. The Commission shall promulgate and publish in the official state paper, and mail to each holder of a certificate or license hereunder, such regulations as it may deem necessary to properly carry out the provisions and purposes of this act. The commission may at any time, for good cause, suspend, and, upon at least five days' notice to the grantee of any certificate and an opportunity to be heard, revoke or amend any certificate. Upon the commission finding that any public carrier does not give convenient, efficient and sufficient service as ordered, such public carrier shall be given a reasonable time to provide such service before any existing certificate is revoked or a new certificate granted. Any rules promulgated by the commission shall include: (a) Every vehicle unit shall be maintained in a safe and sanitary condition at all times. (b) Every operator of a motor vehicle used as a public

carriers and in part with all carriers. As far as private carriers are concerned it enables the Commission to promulgate rules which shall include the requirement that every truck shall be maintained in a safe and sanitary condition at all times. Certainly all trucks on the highway ought to be maintained in a safe condition, and the plaintiffs, hauling food stuffs, ought not to complain if their trucks are required to be kept in a sanitary condition. Operators of private carriers shall be 16 years of age, and shall be of good moral character, and fully competent to operate the truck. The age requirement is valid; the operators should be of good moral character at least to the extent [fol. 52] that they are not addicted to drink or opiates; and they should have enough character to stop and assist the injured in case of an accident. The Commission's power to regulate the hours of service is vital to the safe operation of trucks. A considerable percentage of accidents on the highway are occasioned by those who have driven so long that they have become sleepy or their senses have become numbed. It is not to be presumed that plaintiffs of the standing of these plaintiffs, dealing constantly with the public, would want to equip their trucks with drunken drivers, or to press them to such long hours of service that their faculties have become dulled. Neither is it to be presumed that the Commission will make any require-

---

carrier shall be at least twenty-one years of age; and every operator of other carriers to which this act applies shall be at least sixteen years of age; and all such operators shall be of good moral character and duly competent to operate the motor vehicle under his charge. (c) Hours of service for operators of all motor carriers to which this act applies shall be fixed by the commission. (d) Accidents arising from or in connection with the operation of carriers shall be reported to the commission in such detail, and in such manner as the commission may require; *Provided*, That the failure to report any such accident within five days after the happend ing thereof shall be deemed willful refusal to obey and comply with a rule of the commission. (e) The commission shall require and every carrier shall have attached to each unit or vehicle such distinctive marking as shall be adopted by the commission.

ments as to character, or any requirements as to hours of service, that do not have a direct relation to the safety of the operation of the vehicle. If the Commission does make some such regulation, the regulation would be invalid, and not the statute; and unless the plaintiffs desire to employ drunken or hit-and-run drivers, or unless the plaintiffs want to work them so long that their senses are dulled, the plaintiffs are not hurt. We think that Section 22 has a direct bearing upon the safety of the highways and is within the power of the state.

The plaintiffs rely principally upon Smith v. Cahoon, supra. That was an appeal from the Supreme Court of Florida, which had denied a writ of habeas corpus to the appellant. The appellant had been arrested for operating a truck without a license. The statute undertook to exempt such public carriers as were engaged in the transportation of agricultural, horticultural and piscatorial products. To thus distinguish between two public carriers, each of which is engaged in the transportation for hire, and each of which was a habitual and continual user of the highway, on account of the nature of the product carried, was held to be [fol. 53] unconstitutional. Moreover, the statute contained provisions which could only be legally applicable to common carriers, and other provisions which could be applicable to all carriers, but these provisions intermingled. When the appellant was arrested, the statute had not been construed. The question to be determined was whether or not the appellant could be restrained of his liberty for violating the statute, the terms of which were obscure, and which had not been construed by the courts. He was released. But the Supreme Court stated, "It should be observed that this is not an action in equity where the enforcement of the statute awaits the final determination of the court as to validity and scope." The present case is such an action. The Supreme Court further said that "but until such separation has been accomplished by judicial decision" the statute remained uncertain. But the provisions of the Kansas statute are not so hopelessly intermingled as the Florida statute; and in the second place, the statute has now been construed and nobody is deprived of his liberty. We do not believe that the Cahoon Case controls this case.

Finally it is urged that the statute is in conflict with the Interstate Commerce clause of the constitution. As to private carriers, no discrimination is made between those engaged in intrastate and those engaged in interstate commerce. It has been repeatedly held, in the cases heretofore cited, that the exaction of a fair compensation for the use of the highways of the state, and the enforcement of reasonable measures looking toward the safety of the public on such highways, is not an undue interference with interstate commerce.

The argument of plaintiffs, particularly as to the 25 mile exemption, is logically strong, although we do not see how it works any real discrimination against them, since all within the zone are treated alike. The real objection of [fol. 54] the plaintiffs is to the payment of the tax; but the tax is reasonable in amount, and those who, like plaintiffs, constantly use the highways as an adjunct to their business, ought to pay their share of maintenance. The question of constitutionality of this statute is not free from doubt; but the rule is as settled as it is sound, that in case of doubt, the statute should be upheld.

It follows that the bill should be dismissed and the temporary restraining order heretofore issued should be dissolved. If the plaintiffs desire to appeal, a stay of this order will be granted for a reasonable time in which to perfect the appeal, and until the appeal is determined, provided that the plaintiffs keep and furnish to the Commission a record of the mileage of their trucks subject to taxation, and either pay the taxes under protest, or give a bond to be approved by the Clerk of this court in sufficient amount to insure the payment of such taxes if this decision is affirmed. It is so ordered.

IN UNITED STATES DISTRICT COURT

Dissenting Opinion—Filed Dec. 15, 1931

KENNAMER, District Judge, dissenting:

I concur in the opinion of the majority in so far as the same construes the Kansas Highway Act that the statute

has as its purposes the regulation of the highways and taxation.

I dissent from the views expressed by the majority sustaining the constitutionality of the act. The exemption of motor carriers who operate within radius of twenty five miles beyond corporate limits of any village or city is an unreasonable discrimination in favor of such operators. The necessity for the protection of the public on the highways within radius of twenty five miles is just as great or greater as beyond such radius as the probabilities of damage to persons or property would be more likely than beyond such radius. The case of Smith vs. Cahoon, 283 U. S. 553, seems to me to be controlling.

[File endorsement omitted.]

[fol. 55] IN UNITED STATES DISTRICT COURT

DECREE—Filed Jan. 6, 1932

This cause coming on to be heard before a statutory court of three judges, after due consideration, and being fully advised in the premises, it is by the Court ordered, adjudged and decreed that the bill of complaint herein be and the same is hereby dismissed at petitioners' cost, and the temporary restraining order heretofore issued be hereby dissolved.

George T. McDermott, Cicuit Judge. F. E. Kennamer, District Judge. Richard J. Hopkins, District Judge.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

Petition for Appeal, Assignment of Errors, and Prayer for Reversal—Filed Jan. 9, 1932

PETITION FOR APPEAL

To the Honorable District Court of the United States for the District Court of Kansas, First Division:

Considering themselves aggrieved by the decision of the District Court of the United States for the District of Kan-

sas, First Division, the petitioners therein, Continental Baking Company, a corporation, General Baking Company, a corporation, Schulze Baking Company, a corporation, and Carl Wilke, doing business as the Wilke Baking Company, hereby pray that an appeal be allowed to the Supreme Court of the United States herein, and for an order fixing the amount of the appeal bond thereon; that the amount of the appeal bond be fixed for costs and also for supersedeas.

[fol. 56] ASSIGNMENT OF ERRORS

And the said petitioners, Continental Baking Company, a corporation, General Baking Company, a corporation, Schulze Baking Company, a corporation, and Carl Wilke, doing busines as the Wilke Baking Company, assign the following errors in the record and proceedings in the said case:

1. The District Court of the United States for the District of Kansas, First Division, erred in sustaining defendants' motion to dismiss and dismissing petitioners' bill of complaint in the above entitled cause.

2. The District Court of the United States for the District of Kansas, First Division, erred in refusing petitioners the relief prayed for in their bill of complaint, in refusing petitioners the injunction prayed for, and in dissolving petitioners' temporary restraining order.

3. The District Court of the United States for the District of Kansas, First Division, erred in the memorandum of opinion of the Honorable George T. McDermott, Circuit Judge, and the Honorable Richard J. Hopkins, District Judge, declaring Chapter 236 of the Laws of Kansas, 1931, constitutional when the provisions of the said act violate the due process and equal protection clauses of the Fourteenth Amendment, Article I, Section 8, Clause 3, and Article IV, Section 2 of the Constitution of the United States, and the law as last declared by the Supreme Court of the United States in Smith vs Cahoon, 283 U. S. 553.

4. The District Court of the United States for the District of Kansas, First Division, erred in not accepting the dissenting opinion of the Honorable Franklin E. Kennamer,

District Judge, as declaratory of the law controlling in this case.

5. The District Court of the United States for the District of Kansas, First Division, erred in holding that Chapter 236 of the Laws of Kansas of 1931, was valid and did not violate Section I of the Fourteenth Amendment to the [fol. 57] Constitution of the United States in depriving petitioners of their property without due process of law; in denying petitioners equal protection of the law; in abridging the privileges and immunities of citizens of the United States.

6. The District Court of the United States for the District of Kansas, First Division, erred in holding that the exemption from the effect of said act of "motor carriers who shall operate wholly within any city or village of this State" in Section 2 of Chapter 236 of the Laws of Kansas, 1931, was not arbitrary, discriminatory and void in violation of Section I of the Fourteenth Amendment to the Constitution of the United States in depriving petitioners of their property without due process of law; in denying petitioners equal protection of the law; in abridging the privileges and immunities of citizens of the United States, and was not in conflict with the law as last declared by the Supreme Court of the United States in Smith vs. Cahoon, supra.

7. The District Court of the United States for the District of Kansas, First Division, erred in holding that the exemption from the effect of said Act of private motor carriers "who operate within a radius of 25 miles beyond the corporate limits of such city or any village," in Section 2 of Chapter 236 of the Laws of Kansas of 1931, was not arbitrary, discriminatory and void, and in violation of Section I of the Fourteenth Amendment to the Constitution of the United States in depriving petitioners of their property without due process of law; in denying petitioners equal protection of the law; in abridging the privileges and immunities of citizens of the United States, and was not in conflict with the law as last declared by the Supreme Court of the United States in Smith vs. Cahoon, supra.

8. The District Court of the United States for the District of Kansas, First Division, erred in holding that the

exemption from the effect of said act of private motor carriers "in the transportation of live stock and farm products to market by the owner thereof or supplies for [fol. 58] his own use in his own motor vehicle," was valid and did not violate Section I of the Fourteenth Amendment to the Consitution of the United States in depriving petitioners of this property without due process of law; in denying petitioners equal protection of the law; in abridging the privileges and immunities of citizens of the United States, and was not in conflict with the law as last declared in Smith vs. Cahoon, supra.

9. The District Court of the United States for the District of Kansas, First Division, erred in holding Chapter 236 of the Laws of Kansas, 1931, was valid and not unconstitutional in failing to expressly distinguish the provisions properly applicable to the various carriers classified as private motor carriers of property, and was therefore not void for uncertainty.

10. The District Court of the United States for the District of Kansas, First Division, erred in holding that Section 5 of Chapter 236 of the Laws of Kansas, 1931, was valid and did not violate Section I of the Fourteenth amendment to the Constitution of the United States in depriving petitioners of their property without due process of law; in denying petitioners equal protection of the law; in abridging the privileges and immunities of citizens of the United States, and was not in conflict with the law as last declared by the Supreme Court of the United States in the case of Smith v. Cahoon, supra.

11. The District Court of the United States for the District of Kansas, First Division, erred in holding that Section 5 of Chapter 236 of the Laws of Kansas, 1931, did not subject such private motor carriers of property to the same regulations imposed on common carriers, and was not unconstitutional and void, and beyond the power of the State of Kansas, and was not in conflict with the decision of the Supreme Court of the United States in the case of Smith vs. Cahoon, supra.

[fol. 59] 12. The District Court of the United States for the District of Kansas, First Division, erred in holding that Section 5 of Chapter 236 of the Laws of Kansas, 1931, did not give to the Public Service Commission of the State of Kansas powers in excess of those authorized by the Constitution of the United States, and particularly the Fourteenth Amendement thereto, and in conflict with the decision of the Supreme Court of the United States in the case of Smith vs. Cahoon, supra, with respect to private motor carriers of property, and in holding that the provision of said act making "All laws relating to the powers, duties, authority and jurisdiction of the Public Service Commission over common carriers are hereby made applicable to all such motor carriers except as herein otherwise specifically provided," did not give to the Public Service Commission the right and authority to require private motor carriers to become subject to the regulations and responsibilities of public carriers, which are beyond the power of the State.

13. The District Court of the United States for the District of Kansas, First Division, erred in holding Sections 8, 15, 16, 17, 19, and 23 of Chapter 236 of the Laws of Kansas of 1931, were valid and did not give to the Public Service Commission of the State of Kansas powers over private motor carriers of property in excess of those authorized by the Constitution of the United States, and particularly the Fourteenth Amendment thereto, and not in conflict with the decision of the Supreme Court of the United States in the case of Smith vs. Cahoon, supra.

14. The District Court of the United States for the District of Kansas, First Division, erred in holding that the provisions of Chapter 236 of the Laws of Kansas, 1931, exempting the carriers set forth in Section 2 of said act from the provisions of Section 21 of said act requiring a "liability insurance policy in some insurance company or association authorized to transact business in this State, in such reasonable sum as the Commission may deem necessary to adequately protect the interests of the public [fol. 60] with due regard to the number of persons and amount of property involved, which liability insurance shall bind the obligors thereunder to pay compensation for injuries to persons and loss of or damage to property re-

sulting from the negligent operation of such carrier," was not arbitrary, discriminatory and void, and not in violation of Section I of the Fourteenth Amendment to the Constitution of the United States in depriving petitioners of their property without due process of law; in denying petitioners equal protection of the law; in abridging the privileges and immunities of citizens of the United States, and was not in conflict with the law as last declared by the Supreme Court of the United States in Smith vs. Cahoon, supra.

15. The District Court of the United States for the District of Kansas, First Division, erred in holding that "No other or additional bonds or licenses than those prescribed in this act shall be required of any motor carrier by any city or town or other agency of the state", as provided in Section 21 of Chapter 236 of the Laws of Kansas of 1931, was not arbitrary, discriminatory and void, and in violation of Section I of the Fourteenth Amendment to the Constitution of the United States in depriving petitioners of their property without due process of law; in denying petitioners equal protection of the law; in abridging the privileges and immunities of citizens of the United States, and not in conflict with the law as last declared by the Supreme Court of the United States in the case of Smith vs. Cahoon, supra.

16. The District Court of the United States for the District of Kansas, First Division, erred in holding that Section 22 of Chapter 236 of the Laws of Kansas, 1931, did not subject such private motor carriers of property to the same regulations imposed on common carriers, and was not unconstitutional and void, and beyond the power of the State of Kansas, and was not in conflict with the law as last declared by the Supreme Court of the United States in Smith vs. Cahoon, supra.

[fol. 61] 17. The District Court of the United States for the District of Kansas, First Division, erred in holding that Chapter 236 of the Laws of Kansas of 1931, did not conflict with and is not repugnant to Article I, Section 8, Par. 3, of the Constitution of the United States delegating to Congress the exclusive power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes.

PRAYER FOR REVERSAL

For which errors the petitioners, Continental Baking Company, a corporation, General Baking Company, a corporation, Schulze Baking Company, a corporation, and Carl Wilke, doing business *and* the Wilke Baking Company, pray that said judgment and decree of the District Court of the United States for the District of Kansas, First Division, dated January 6th, 1932, in the above entitled cause be reversed and a judgment rendered in favor of said petitioners and for costs.

R. L. Stephens, Charles R. Wilke, John C. Grover,
Counsel for Appellants.

Received copy of the foregoing Petition for Appeal, Assignment of Errors, and Prayer for Reversal this 9th day of January, 1932.

Harry H. Woodring, as Governor of the State of Kansas; Roland Boynton, as Attorney General of the State of Kansas; Jesse W. Greenleaf, Thurman Hill, and Charles W. Campbell, as Members of the Public Service Commission of the State of Kansas, by Roland Boynton, Walter T. Griffin, Chas. W. Steiger, Earl H. Hatcher, Attorneys for Appellees.

[File endorsement omitted.]

[fol. 62] IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL—Filed Jan. 9, 1932

The Appellants in the above entitled suit, and each of them, having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from the judgment and decree made and entered in the above entitled suit by the District Court of the United States for the District of Kansas, First Division, on the 6th day of January, 1932, and from each and every part thereof, and having presented and filed their petition for appeal, assignment of errors, and prayer for reversal, pursuant to the statutes and the rules of the Supreme Court of the United States in such case made and provided.

It is now here ordered that an appeal be, and the same is hereby, allowed to the Supreme Court of the United

States from the District Court of the United States for the District of Kansas, First Division, in this cause, as provided by law, and it is further ordered that the Clerk of the Court appealed from shall prepare and certify a transcript of the record, proceedings, judgment and decree in this cause and transmit the same to the Supreme Court of the United States, so that he shall have the same in said Court within thirty days of this date.

And it is further ordered that security for costs on appeal be fixed in the sum of $5000.00 and that bond be given therefore, and that said bond when approved and filed shall serve as a supersedeas.

Geo. T. McDermott, Circuit Judge. F. E. Kennamer, District Judge. Richard J. Hopkins, District Judge.

Dated January 9, 1932.

[File endorsement omitted.]

[fols. 63-65] Supersedeas bond on appeal for $5,000, approved and filed Jan. 9, 1932, omitted in printing.

[fol. 66] IN UNITED STATES DISTRICT COURT

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed Jan. 9, 1932

To the Honorable F. L. Campbell, Clerk District Court of the United States for the District of Kansas, First Division:

In the certified transcript of the record in the above entitled cause to be made and transmitted to the Supreme Court of the United States pursuant to an order allowing appeal, dated January 9th, 1932, signed by the Honorable George T. McDermott, Circuit Judge, kindly incorporate the following:

1. Bill of Complaint for injunction filed by petitioners, (appellants here) in the District Court of the United States for the District of Kansas, First Division:

2. Exhibit "A" attached to bill of complaint filed by petitioners, being a copy of Chapter 236 of the Laws of Kansas, 1931;

3. Temporary restraining order issued by the Honorable Richard J. Hopkins, District Judge;
4. Bond on temporary restraining order;
5. Motion to dismiss filed by defendants;
6. Request for convening of three-judge Court, filed by defendants;
7. Petitioners consent to request for convening of three-judge Court;
8. Order designating judges and fixing date of hearing of three-judge Court;
9. Notices of hearing filed by petitioners and defendants;
10. Order of Court on hearing;
11. Memorandum opinion of the District Court filed December 15, 1931;
12. Dissenting opinion of the Honorable Franklin E. Kennamer, District Judge, filed December 15, 1931;
13. Final decree or order of Court dismissing cause at cost of petitioners;
[fol. 67] 14. Appelants' petition for appeal to the United States Supreme Court, assignment of errors, and prayer for reversal;
15. Order allowing appeal;
16. Copy of bond on appeal;
17. Citation to appellees, with return thereon;
18. This Præcipe;
19. All Journal entries in their proper order.

R. L. Stephens, Charles R. Wilke, John C. Grover, Attorneys for Appellants (Petitioners).

Received copy of foregoing Præcipe this 9th day of January, 1932.

Harry H. Woodring, as Governor of the State of Kansas; Roland Boynton, as Attorney General of the State of Kansas; Jesse W. Greenleaf, Thurman Hill, and Charles W. Campbell, as Members of the Public Service Commission of the State of Kansas, Appellees (Defendants), by Roland Boynton, Walter T. Griffin, Earl H. Hatcher, Charles W. Steiger, Attorneys for Appellees (Defendants).

[File endorsement omitted.]

[fol. 68] Clerk's certificate to foregoing transcript omitted in printing.

SUPREME COURT OF THE UNITED STATES

[fols. 69 & 70] STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF THE PARTS OF THE RECORD TO BE PRINTED—Filed Feb. 6, 1932.

Come now the appellants and adopt their assignments of error as their statement of the points to be relied upon, and represent that the whole of the record, as filed, is necessary for the consideration of the case.

Charles R. Wilke, John C. Grover, Counsel for Appellants.

Service of copy of the above notice is hereby acknowledged this 3rd day of Febuary, 1932.

Harry H. Woodring, as Governor of the State of Kansas; Roland Boynton, as Attorney General of the State of Kansas; Jesse W. Greenleaf, Thurman Hill, and Charles W. Campbell, as members of the Public Service Commission of the State of Kansas, by Roland Boynton, Walter T. Griffin, Charles W. Steiger, Earl H. Hatcher, Counsel for Appellees.

[fol. 71] [File endorsement omitted.]

Endorsed on cover: File No. 36,491. Kansas D. C. U. S. Term No. 677. Continental Baking Company, General Baking Company, Schulze Baking Company, et al., appellants, vs. Harry H. Woodring, as Governor of the State of Kansas, et al., etc., et al. Filed February 3, 1932. File No. 36,491.

FILE COPY

FILED
FEB 16 19
CHARLES ELMORE C

In the

Supreme Court of the United States

October Term, 1931.

No. 677.

CONTINENTAL BAKING COMPANY, a corporation,
GENERAL BAKING COMPANY, a corporation,
SCHULZE BAKING COMPANY, a corporation, and
CARL WILKE, doing business as the WILKE BAKING COMPANY, *Appellants,*

vs.

HARRY H. WOODRING, as Governor of the State of Kansas, ROLAND BOYNTON, as Attorney General of the State of Kansas, JESSE W. GREENLEAF, THURMAN HILL and CHARLES W. CAMPBELL as members of the Public Service Commission of the State of Kansas, *Appellees.*

APPELLANTS' STATEMENT AS TO JURISDICTION ON APPEAL.

(Filed pursuant to Rule 12.)

CHARLES R. WILKE,
JOHN C. GROVER,
Attorneys for Appellants.

SMITH-GRIEVES, LAW PRINTERS, KANSAS CITY, MO.

In the

Supreme Court of the United States

October Term, 1931.

No. 677.

CONTINENTAL BAKING COMPANY, a corporation, GENERAL BAKING COMPANY, a corporation, SCHULZE BAKING COMPANY, a corporation, and CARL WILKE, doing business as the WILKE BAKING COMPANY, *Appellants,*

vs.

HARRY H. WOODRING, as Governor of the State of Kansas, ROLAND BOYNTON, as Attorney General of the State of Kansas, JESSE W. GREENLEAF, THURMAN HILL and CHARLES W. CAMPBELL as members of the Public Service Commission of the State of Kansas, *Appellees.*

APPELLANTS' STATEMENT AS TO JURISDICTION ON APPEAL.

(Filed pursuant to Rule 12.)

MAY IT PLEASE THE COURT:

The appellants in support of the jurisdiction of this Court to review the above entitled cause on appeal respectfully represent:

A.

Statutory Provision Sustaining Jurisdiction.

The Act of February 13, 1925, Chapter 229, Section 1, 43 Stat. 936, 938 (United States Code, Title 28, Section 345), provides that Section 238 of the Judicial Code is amended to read in part as follows:

> "Sec. 238. A direct review by the Supreme Court of an interlocutory or final judgment or decree of a district court may be had where it is so provided in the following Acts or parts of Acts, and not otherwise:
>
> * * * * * * *
>
> (3) Sec. 380 of this title."

Section 380 of said Act, being Sec. 266 amended of the Judicial Code, reads in part as follows:

> "No interlocutory injunction suspending or restraining the enforcement, operation, or execution of any statute of a State by restraining the action of any officer of such State in the enforcement or execution of such statute, or in the enforcement or execution of an order made by an administrative board or commission acting under and pursuant to the statutes of such State, shall be issued or granted by any justice of the Supreme Court, or by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, upon the ground of the unconstitutionality of such statute, unless the application for the same shall be presented to a justice of the Supreme Court of the United States, or to a circuit or district judge, and shall be heard and determined by three judges of whom at least one shall be a justice of the Supreme Court or a circuit judge, and the other two may be either circuit or district judges, and unless a majority of

said three judges shall concur in granting such application. * * *

An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction in such case. * * *

The requirement respecting the presence of three judges shall also apply to the final hearing in such suit in the district court; and a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit."

B.

Date of Decree and Date of Application for Appeal.

The decree sought to be reviewed was entered on the 6th day of January, 1932, (R.* 55).

The application for appeal was presented on the 9th day of January, 1932, (R.* 55).

C.

Nature of Case and Ruling Below.

This is an appeal from the decision of a statutory three judge court, convened in the United States District Court for the District of Kansas, First Division. The 1931 Legislature of Kansas enacted a law known as Chapter 236 of the Laws of Kansas, 1931, and entitled "Relating to Motor Carriers and to Transportation thereon over the Public Highways." This Act was duly

*All references to the record are to the pages of the certified unprinted record prepared by the clerk of the District Court for the District of Kansas, First Division, and on file with the clerk of this Court. The record has not yet been printed.

approved March 16, 1931; published May 28, 1931, and took effect on July 1, 1931.

The petitioner, Continental Baking Company, is a Delaware corporation, with its principal place of business in New York City; petitioner, General Baking Company, is a New York corporation, with its principal place of business in New York City; petitioner, Schulze Baking Company, is an Illinois corporation, with its principal place of business in the City of Chicago, Illinois, and Carl Wilke is an individual operating as the Wilke Baking Company in Beatrice, Nebraska. All of the petitioners are engaged in the general baking business.

On the 21st day of September, 1931, petitioners filed a bill of complaint in the United States District Court for the District of Kansas, First Division, at Topeka, in which Harry H. Woodring, as Governor of the State of Kansas; Roland Boynton, as Attorney General of the State of Kansas, and Jesse W. Greenleaf, Thurman Hill and Charles W. Campbell as members of the Public Service Commission of the State of Kansas, were made defendants (R.* 3-22). In petitioners' bill of complaint they allege that Chapter 236 of the Laws of Kansas, 1931, discriminates against them and violates and abrogates the rights and privileges guaranteed to them by the Constitution of the United States, and particularly Section 1 of the Fourteenth Amendment to the Constitution of the United States in that the exemption from the provisions of said Act in Section 2 thereof, of (a) motor carriers who shall operate wholly within any city or village of the state; (b) private motor carriers who operate within a radius of 25 miles beyond the corporate limits of such city, or any village; (c) the transportation of live stock and farm products to market by the owner thereof or supplies for his own use in his own

motor vehicle; (d) the transportation of children to and from school, is arbitrary, discriminatory and void.

Section 2 in conjunction with the other sections of the Act is unconstitutional in that it fails to define with a sufficient degree of certainty the obligation the State imposes upon petitioners.

Section 5 of said Act subjects private motor carriers of property to the same regulations imposed upon common carriers and gives to the Public Service Commission of the State of Kansas powers far in excess of those authorized by the Constitution of the United States.

Section 21 of said Act in requiring liability insurance exempted certain enumerated carriers in Section 2; Section 21, in providing that no other or additional bonds or licenses than those prescribed in this Act shall be required of any motor carrier by any city or town or other agency of the State.

That Section 2 of said Act subjected private motor carriers of property to the same regulations as common carriers, and that the whole of said Act attempted to regulate commerce in violation of Article I, Section 8, par. 3 of the Constitution of the United States, in depriving them of their property without due process of law, and denying them equal protection of the law, and in abridging the privileges and immunities of citizens of the United States. Also that said Act violates Article I, Section 8, paragraph 3 of the Constitution of the United States delegating to Congress the exclusive power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes. Also Article 4 of Section 2 of the Constitution of the United States in denying them the privileges and immunities guaranteed by the Constitution.

Petitioners prayed that the Act be declared unconstitutional, a temporary restraining order be issued, a final injunction issued, and for such other and further proper relief that may to the court seem just and proper (R.* 14).

On the 22nd day of September, 1931, a temporary restraining order was signed by the Honorable Richard J. Hopkins, District Judge (R.* 22), and on the same day bond fixed, approved, executed and filed (R.* 24), and on the 24th day of September, 1931, defendants filed a motion to dismiss (R.* 26), and on the 29th day of September, 1931, defendants filed a request for the convening of a statutory three judge court (R.* 27) to which petitioners consented (R.* 28), and on the 2nd day of October, 1931, an order was made convening said court, fixing the time for hearing as of October 10, 1931, at Topeka, and convening and designating George T. McDermott, Circuit Judge; Franklin E. Kennamer, District Judge; and Richard J. Hopkins, District Judge, as the statutory three judge court to hear the case (R.* 29).

On the 24th day of September, 1931, defendants served and filed notice of hearing (R.* 27); on the 3rd day of October petitioners served and filed notice of hearing (R.* 30); and on the 10th day of October, 1931, the case was heard by the aforesaid statutory three judge court, and taken under advisement, with an order continuing the restraining order and bond (R.* 30½). On the 15th day of December, Judge McDermott handed down a memorandum opinion concurred in by Judge Hopkins, upholding the constitutionality of the Act, dismissing petitioners' bill of complaint, dissolving the temporary restraining order (R.* 31), and a dissenting memo-

randum by Judge Franklin E. Kennamer, dissenting, holding that the Act was unconstitutional and violated the law as last declared by the Supreme Court of the United States in the case of *Smith* v. *Cahoon,* 283 U. S. 553 (R.* 54).

On the 6th day of January, 1932, the statutory three judge court for the District Court of the United States for the District of Kansas, First Division, entered the decree dismissing the bill of complaint of petitioners, dissolving the temporary restraining order heretofore issued, and denying petitioners the relief prayed (R.* 55). On the 9th day of January, 1932, petitioners duly served and filed their petition for appeal (R.* 55), assignment of errors (R.* 56), and prayer for reversal (R.* 61). On the 9th day of January, 1932, Judges George T. McDermott, Franklin E. Kennamer and Richard J. Hopkins made an order allowing the appeal (R.* 62), and fixing the bond at five thousand ($5,000.00) dollars, the bond to act as a supersedeas (R.* 62).

On the 9th day of January, 1932, petitioners' bond was approved and filed (R.* 63, 65) and on the 9th day of January the petitioners duly filed and served the citation for appeal (R.* 1), and on the 9th day of January, 1932, petitioners duly served and filed their præcipe (R.* 66), and on the 3rd day of February, 1932, petitioners' appeal was duly filed with the clerk of the Supreme Court of the United States and docketed as No. 677.

D.

Cases Believed to Sustain Jurisdiction.

The following decisions of this court are believed to sustain jurisdiction of this appeal:

Clark v. *Poor*, 274 U. S. 554.
Smith v. *Wilson*, 273 U. S. 388, 391.
Moore v. *Fidelity & Deposit Co.*, 272 U. S. 317, 320.
Ex parte Buder, 271 U. S. 461, 464, 465.
Pacific Telephone & Telegraph Co. v. *Kuykendall*, 265 U. S. 196, 206.
Shaffer v. *Carter*, 252 U. S. 37, 44.

We respectfully submit that this court has jurisdiction of this appeal by virtue of Sections 238 and 266 of the Judicial Code as amended by the Act of February 13, 1925.

Respectfully submitted,

CHARLES R. WILKE,
JOHN C. GROVER,
Counsel for Appellants.

FILE COPY

APR 7 19

In the Supreme Court of the United States

October Term, 1931.

No. 677.

CONTINENTAL BAKING COMPANY, a corporation;
GENERAL BAKING COMPANY, a corporation;
SCHULZE BAKING COMPANY, a corporation, and
CARL WILKE, doing business as the WILKE BAKING COMPANY, *Appellants*,

vs.

HARRY H. WOODRING, as Governor of the State of Kansas; ROLAND BOYNTON, as Attorney General of the State of Kansas; JESSE W. GREENLEAF, THURMAN HILL and CHARLES W. CAMPBELL, as members of the Public Service Commission of the State of Kansas, *Appellees*.

BRIEF OF APPELLANTS.

CHARLES R. WILKE,
JOHN C. GROVER,
Counsel for Appellants.

SMITH-GRIEVES, LAW PRINTERS, KANSAS CITY, MO.

INDEX

PAGE

Opinion of Court Below 1-2

Jurisdiction 2

Statement 3-6

Specification of Errors 7-12

Summary of Argument 13-19

Argument 20-56

Appellees' motion to dismiss appellants' bill of complaint admits the truth of all well pleaded facts in the bill of complaint and every reasonable inference in appellants' favor that is deducible from them 13, 20

The exemption from the provisions of the act of motor carriers who operate wholly within any city or village of the state 14, 21

The exempting from the provisions of the act private motor carriers who operate within a radius of 25 miles beyond the corporate limits of such city or any village, is unconstitutional and void, and violates the Fourteenth Amendment to the Constitution of the United States .. 15, 28

The exemption from the provisions of the act of the transportation of live stock and farm products to market by the owner thereof, or supplies for his own use in his own motor vehicle, is unconstitutional and void, and violates the Fourteenth Amendment to the Constitution of the United States 16, 41

The exemption from the provisions of the act of motor carriers operating in the transportation of children to and from school is unconstitutional and void, and violates Section 1 of the Fourteenth Amendment to the Constitution of the United States 17, 45

PAGE

Either Sections 2, 17, 19, 23 and 24 of the act, taken in conjunction with the entire act, impose upon the appellants obligations to which the state had no constitutional authority to subject them, or they failed to define such obligations with a fair degree of certainty, which is required of criminal statutes.....17, 46

Sections 5, 8, 16, 17, 19, 22 and 23 in conjunction with the other provisions of the act give to the Public Service Commission of the State of Kansas powers far in excess of those authorized by the Constitution of the United States and the laws thereof with respect to private motor carriers of property.....18, 50

Section 21 of the act taken in conjunction with Section 2 of the act is unconstitutional and void, as discriminatory and arbitrary.....18, 54

Conclusion.....56

Appendix "A".....57-67

TABLE OF CASES AND AUTHORITIES CITED.

United States Constitution and Statutes.

	PAGE
Chapter 229, Section 1, 43 Stat. 936, 938 (U. S. C. A. Title 28, Secs. 345, 380, same being Secs. 238 and 266 of the Judicial Code)	2
Fourteenth Amendment to the Constitution of the United States	8
Section 2 of Article 4 of the Constitution of the United States	5
Section 8 of Article 1 of the Constitution of the United States	5

Federal Decisions.

Carley & Hamilton v. Snook, 281 U. S. 66	36
Chicago R. I. & P. Ry. Co. v. United States, 52 S. Ct. Rep. 87	35
Clark v. Maxwell, 282 U. S. 811	35
Compagnia Italiana Transporto Olii Minerali v. Sun Oil Co., 29 Fed. (2nd) 744	13, 20
Connally v. General Construction Co., 269 U. S. 385.	49
Frost et al. v. Railroad Com., 271 U. S. 583	18, 54
Gast Realty Co. v. Schneider Granite Co., 240 U. S. 58	14, 22
Houck v. Little River Drainage District, 239 U. S. 262	15,22
Kansas City Southern Ry. Co. v. Road Improvement District, 256 U. S. 660	15, 22
Louisville Gas and Electric Co. v. Coleman, 277 U. S. 32	14, 22
Louis v. Boynton, 53 Fed. (2nd) 473	23, 45
Martin v. Dist. of Columbia, 205 U. S. 139	14, 22
Michigan Public Utility Com. v. Duke, 266 U. S. 570	18, 54

PAGE

New York L. Ins. Co. v. Bidoggia, 17 Fed. (2nd) 112. . . . . 13, 20

Producers Transport Co. v. Railway Commission, 251 U. S. 228. . . . . 18, 54

Royster-Gucano Co. v. Virginia, 253 U. S. 415. . . 14, 22

Smith v. Cahoon, 283 U. S. 553. . . . . 6, 7, 14, 18, 19

Sullivan v. Iron Mineral Co., 109 U. S. 555. . . . . 13, 20

Western Ranches v. Custer Co., 89 Fed. 577. . . . . 13, 20

Decisions of State Courts.

Clark v. Maxwell, 197 N. Car. 604. 35

Federal Reserve Life Ins. Co. v. Gregory, 132 Kas. 132. . . . . 13, 20

Gano v. Cunningham, 88 Kas. 302. . . . . 13, 20

State v. Le Febvre, 174 Minn. 248. 43

State ex rel. v. Kozer, 116 Ore. 581. . . . . 36, 43

Stewart v. Balderston, 10 Kas. 148. . . . . 13, 20

Smith v. Cahoon, 99 Fla. 1174. 44

Southern Transfer Co. v. Harris, 171 Ga. 358. . . . 43

Digests and Text Books.

49 C. J. 668, par. 946. 13

Jesse L. Wheeler's Grammar at Work (new edition). 52

Professor D. V. Marti's English and Use. 52

Goold Brown's The Grammar of English Grammars. 52

In the Supreme Court of the United States

October Term, 1931.

No. 677.

CONTINENTAL BAKING COMPANY, a corporation;
GENERAL BAKING COMPANY, a corporation;
SCHULZE BAKING COMPANY, a corporation, and
CARL WILKE, doing business as the WILKE BAKING COMPANY, *Appellants*,

vs.

HARRY H. WOODRING, as Governor of the State of Kansas; ROLAND BOYNTON, as Attorney General of the State of Kansas; JESSE W. GREENLEAF, THURMAN HILL and CHARLES W. CAMPBELL, as members of the Public Service Commission of the State of Kansas, *Appellees*.

BRIEF OF APPELLANTS.

I.

Opinion of Court Below.

The opinion of the statutory three-judge Federal Court sitting as the District Court of the District of Kansas, First Division, is not yet officially reported but appears as *Continental Baking Co. et al.* v. *Woodring, Governor of*

Kansas, et al., in the 55th Federal Reporter, second series, at pages 347 to 359, inclusive, and in the printed record in this case at pages 26 to 46, inclusive.

II.

Jurisdiction.

On the 16th day of February, 1932, appellants filed their statement as to jurisdiction on appeal in this Court, and on the 28th day of March, 1932, this Court made a finding that probable jurisdiction was noted.

The statutory provisions relied upon to sustain jurisdiction in appellants' statement as to jurisdiction on appeal are in the Act of February 13, 1925, Chapter 229, Section I, 43 Stat. 936 and 938 (U. S. Code, Title 28, Sections 345 and 380, the same being Sections 238 and 266 of the Judicial Code as amended).

III.

STATEMENT.

This is an appeal from the decision of a statutory three judge court convened in the United States District Court for the District of Kansas, First Division.

The 1931 Legislature of the State of Kansas enacted a law known as Chapter 236 of the Laws of Kansas, 1931, pages 344-350, and entitled "Relating to Motor Carriers and to Transportation thereon over the Public Highways." (R. 11-19.) This act was duly approved March 16, 1931, published May 28, 1931, and took effect on July 1, 1931. (Copy of said act is attached to this brief as appendix "A.")

Section I of the Kansas Act classifies motor carriers as "public motor carriers of property," "contract motor carriers of property," "private motor carriers of property," "public motor carriers of passengers" and "contract motor carriers of passengers." (R. 11-12.)

This act lays a special tax, based on truck capacity and mileage upon the above enumerated carriers of persons and property, and subjects them to the rules and regulations of the Public Service Commission, and requires of them insurance, reports, and information covering public safety and other purposes.

On the 21st day of September, 1931, appellants filed a bill of complaint in the United States District Court for the District of Kansas, First Division, at Topeka, in which Harry H. Woodring, as Governor of the State of Kansas, Roland Boynton, as Attorney General of the State of Kansas, Jesse W. Greenleaf, Thurman Hill and Charles W. Campbell, as members of the Public Service

Commission of the State of Kansas, were made defendants. (R. 1-11.)

In the bill of complaint it is alleged that all of the appellants are engaged in the manufacturing of bread and other bakery products in plants owned by them, and delivered by their own trucks in the State of Kansas. That appellant Continental Baking Company is a Delaware corporation with its principal place of business in New York City, with plants owned by it in the City of Wichita, Kansas, and the City of St. Joseph, Missouri, and the City of Kansas City, Missouri; that appellant General Baking Company is a New York corporation with its principal place of business in the City of New York, with plants owned by it located in the City of Wichita, Kansas, City of Hutchison, Kansas, City of Kansas City, Kansas, and City of Kansas City, Missouri; that appellant Schulze Baking Company is an Illinois corporation, with its principal place of business in the City of Chicago, Illinois, with a plant owned and located in the City of Kansas City, Missouri, and that appellant Carl Wilke is an individual doing business as the Wilke Baking Company with a plant located in Beatrice, Nebraska. That all of the appellants are private motor carriers of property as defined by the provisions of the Act of Kansas. (R. 5-6.)

Appellants' bill of complaint attacks the constitutionality of Chapter 236 of the Laws of Kansas, 1931, on the ground that it violates the Fourteenth Amendment to the Constitution of the United States by exempting from the provisions of the Act: (a) Motor carriers who operate wholly within any city or village of the State; (b) Private motor carriers who operate within a radius of 25 miles beyond the corporate limits of such city or any village; (c) The transportation of live stock

and farm products to market by the owner thereof or supplies for his own use in his own motor vehicle; and (d) The transportation of children to and from school.

Appellants' bill of complaint further attacks the constitutionality of Section 2 of the Act in conjunction with the other Sections of the Act in that it fails to define with a sufficient degree of certainty the obligation the State imposes upon appellants and subjects them to fines and imprisonment upon violation of the Act.

Appellants' bill of complaint attacks Section 5 of the Acts taken in conjunction with Sections 8, 16, 17, 19, 22 and 23 as unconstitutional and void in violation of the equal protection, due process and commerce clauses of the Constitution of the United States, in that it gives to the Public Service Commission powers over appellants, private carriers of property, and the right to issue rules and regulations, and make appellants common carriers.

Appellants' bill of complaint alleges that Section 21 of the Act denies the petitioners the privileges and immunities of the citizens of the several states as guaranteed by Article 4, Section 2, of the Constitution of the United States, and denies petitioners equal protection of the law as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Appellants' bill of complaint alleges that the entire Act is unconstitutional and void in that by the Act the legislature of Kansas attempts to invade the power exclusively delegated to Congress by Article I, Section 8, Clause 3, of the Constitution of the United States.

On September 22, 1931, a temporary restraining order was issued. (R. 20.) On the 24th day of September, 1931, defendants filed a motion to dismiss the bill of complaint. (R. 21.) Upon motion the statutory three judge court

was convened (R. 24), and October 10, 1931, the case was heard by the judges convened in that court.

On December 15, 1931, a memorandum opinion was handed down by Judge McDermott, concurred in by Judge Hopkins, holding the Act constitutional, and dismissing petitioners' bill of complaint and dissolving the restraining order (R. 26-45), and a dissenting memorandum opinion by Judge Franklin E. Kennamer, holding that the Act was unconstitutional, and violated the law as last declared by the Supreme Court of the United States in *Smith* v. *Cahoon,* 283 U. S. 553. (R. 45-46.)

On the 6th day of January, 1932, the Court entered a decree dismissing the bill of complaint of appellants, dissolving the temporary restraining order heretofore issued, and denying appellants the relief prayed. (R. 46.)

On the 9th day of January, 1932, the appellants duly served and filed their petition for appeal, assignment of errors and prayer for reversal (R. 46-52), and on the 9th day of January, 1932, the court made an order allowing the appeal, and fixing the bond at $5,000, the bond to act as a supersedeas. (R. 52.) On the 9th day of January, 1932, appellants' bond was approved and filed (R. 53), and on the 9th day of January, 1932, appellants duly served and filed the citation for appeal, and on the 9th day of January, 1932, appellants duly served and filed their praecipe (R. 53-54), and on the 3rd day of February, 1932, appellants' appeal was duly filed with the Clerk of the Supreme Court of the United States, and the cause docketed as No. 677. On the 16th day of February, 1932, appellants duly served and filed their statements as to jurisdiction on appeal in this Court, and on the 28th day of March, 1932, this Court noted probable jurisdiction of the case.

IV.

SPECIFICATION OF ERRORS.

The assigned errors intended to be urged are:

1. The District Court of the United States for the District of Kansas, First Division, erred in sustaining defendants' motion to dismiss and dismissing petitioners' bill of complaint in the above entitled cause.

2. The District Court of the United States for the District of Kansas, First Division, erred in refusing petitioners the relief prayed for in their bill of complaint, in refusing petitioners the injunction prayed for, and in dissolving petitioners' temporary restraining order.

3. The District Court of the United States for the District of Kansas, First Division, erred in the memorandum opinion of the Honorable George T. McDermott, Circuit Judge, and the Honorable Richard J. Hopkins, District Judge, declaring Chapter 236 of the Laws of Kansas, 1931, constitutional when the provisions of said act violate the due process and equal protection clauses of the Fourteennth Amendment, Article I, Section 8, Clause 3, and Article IV, Section 2 of the Constitution of the United States, and the law as last declared by the Supreme Court of the United States in *Smith* v. *Cahoon,* 283 U. S. 553.

4. The District Court of the United States for the District of Kansas, First Division, erred in not accepting the dissenting opinion of the Honorable Franklin E. Kennamer, District Judge, as declaratory of the law controlling in this case.

5. The District Court of the United States for the District of Kansas, First Division, erred in holding that

Chapter 236 of the Laws of Kansas of 1931, was valid and did not violate Section I of the Fourteenth Amendment to the Constitution of the United States in depriving petitioners of their property without due process of law; in denying petitioners equal protection of the law; in abridging the privileges and immunities of citizens of the United States.

6. The District Court of the United States for the District of Kansas, First Division, erred in holding that the exemption from the effect of said act of "motor carriers who shall operate wholly within any city or village of this State" in Section 2 of Chapter 236 of the Laws of Kansas, 1931, was not arbitrary, discriminatory and void in violation of Section I of the Fourteenth Amendment to the Constitution of the United States in depriving petitioners of their property without due process of law; in denying petitioners equal protection of the law; in abridging the privileges and immunities of citizens of the United States, and was not in conflict with the law as last declared by the Supreme Court of the United States in *Smith* v. *Cahoon, supra.*

7. The District Court of the United States for the District of Kansas, First Division, erred in holding that the exemption from the effect of said act of private motor carriers "who operate within a radius of 25 miles beyond the corporate limits of such city or any village," in Section 2 of Chapter 236 of the Laws of Kansas of 1931, was not arbitrary, discriminatory and void, and in violation of Section I of the Fourteenth Amendment to the Constitution of the United States in depriving petitioners of their property without due process of law; in denying petitioners equal protection of the law; in abridging the privileges and immunities of citizens of the United States, and was not in conflict with the law as last de-

clared by the Supreme Court of the United States in *Smith* v. *Cahoon, supra.*

8. The District Court of the United States for the District of Kansas, First Division, erred in holding that the exemption from the effect of said act of private motor carriers "in the transportation of live stock and farm products to market by the owner thereof or supplies for his own use in his own motor vehicle," was valid and did not violate Section I of the Fourteenth Amendment to the Constitution of the United States in depriving petitioners of their property without due process of law; in denying petitioners equal protection of the law; in abridging the privileges and immunities of citizens of the United States, and was not in conflict with the law as last declared in *Smith* v. *Cahoon, supra.*

9. The District Court of the United States for the District of Kansas, First Division, erred in holding Chapter 236 of the Laws of Kansas, 1931, was valid and not unconstitutional in failing to expressly distinguish the provisions properly applicable to the various carriers classified as private motor carriers of property, and was therefore not void for uncertainty.

10. The District Court of the United States for the District of Kansas, First Division, erred in holding that Section 5 of Chapter 236 of the Laws of Kansas, 1931, was valid and did not violate Section I of the Fourteenth Amendment to the Constitution of the United States in depriving petitioners of their property without due process of law; in denying petitioners equal protection of the law; in abridging the privileges and immunities of citizens of the United States, and was not in conflict with the law as last declared by the Supreme Court of the United States in the case of *Smith* v. *Cahoon, supra.*

11. The District Court of the United States for the District of Kansas, First Division, erred in holding that Section 5 of Chapter 236 of the Laws of Kansas, 1931, did not subject such private motor carriers of property to the same regulations imposed on common carriers, and was not unconstitutional and void, and beyond the power of the State of Kansas, and was not in conflict with the decision of the Supreme Court of the United States in the case of *Smith* v. *Cahoon, supra.*

12. The District Court of the United States for the District of Kansas, First Division, erred in holding that Section 5 of Chapter 236 of the Laws of Kansas, 1931, did not give to the Public Service Commission of the State of Kansas powers in excess of those authorized by the Constitution of the United States, and particularly the Fourteenth Amendment thereto, and in conflict with the decision of the Supreme Court of the United States in the case of *Smith* v. *Cahoon, supra,* with respect to private motor carriers of property, and in holding that the provision of said act making "All laws relating to the powers, duties, authority and jurisdiction of the Public Service Commission over common carriers are hereby made applicable to all such motor carriers, except as herein otherwise specifically provided," did not give to the Public Service Commission the right and authority to require private motor carriers to become subject to the regulations and responsibilities of public carriers, which are beyond the power of the State.

13. The District Court of the United States for the District of Kansas, First Division, erred in holding Sections 8, 15, 16, 17, 19 and 23 of Chapter 236 of the Laws of Kansas of 1931, were valid and did not give to the Public Service Commission of the State of Kansas

powers over private motor carriers of property in excess of those authorized by the Constitution of the United States, and particularly the Fourteenth Amendment thereto, and not in conflict with the decision of the Supreme Court of the United States in the case of *Smith* v. *Cahoon, supra.*

14. The District Court of the United States for the District of Kansas, First Division, erred in holding that the provisions of Chapter 236 of the Laws of Kansas, 1931, exempting the carriers set forth in Section 2 of said act from the provisions of Section 21 of said act requiring a "liability insurance policy in some insurance company or association authorized to transact business in this state, in such reasonable sum as the Commission may deem necessary to adequately protect the interests of the public with due regard to the number of persons and amount of property involved, which liability insurance shall bind the obligors thereunder to pay compensation for injuries to persons and loss of or damage to property resulting from the negligent operation of such carrier," was not arbitrary, discriminatory and void, and not in violation of Section I of the Fourteenth Amendment to the Constitution of the United States in depriving petitioners of their property without due process of law; in denying petitioners equal protection of the law; in abridging the privileges and immunities of citizens of the United States, and was not in conflict with the law as last declared by the Supreme Court of the United States in *Smith* v. *Cahoon, supra.*

15. The District Court of the United States for the District of Kansas, First Division, erred in holding that "No other or additional bonds or licenses than those prescribed in this act shall be required of any motor carrier

by any city or town or other agency of the state," as provided in Section 21 of Chapter 236 of the Laws of Kansas of 1931, was not arbitrary, discriminatory and void, and in violation of Section I of the Fourteenth Amendment to the Constitution of the United States in depriving petitioners of their property without due process of law; in denying petitioners equal protection of the law; in abridging the privileges and immunities of citizens of the United States, and not in conflict with the law as last declared by the Supreme Court of the United States in the case of *Smith* v. *Cahoon, supra.*

16. The District Court of the United States for the District of Kansas, First Division, erred in holding that Section 236 of the Laws of Kansas, 1931, did not subject such private motor carriers of property to the same regulations imposed on common carriers, and was not unconstitutional and void, and beyond the power of the State of Kansas, and was not in conflict with the law as last declared by the Supreme Court of the United States in *Smith* v. *Cahoon, supra.*

17. The District Court of the United States for the District of Kansas, First Division, erred in holding that Chapter 236 of the Laws of Kansas of 1931, did not conflict with and is not repugant to Article I, Section 8, par. 3, of the Constitution of the Unied States delegating to Congress the exclusive power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.

V.

SUMMARY OF ARGUMENT.

1.

Appellees' motion to dismiss appellants' bill of complaint admits the truth of all well pleaded facts in the bill of complaint and every reasonable inference in appellants' favor that is deducible from them.

Appellees filed a motion to dismiss appellants' bill of complaint, which motion was in the form and served the purpose of a motion for judgment on the pleadings. Under the rules of pleading in the Federal Courts and in the State Courts of Kansas, such a motion admits the truth of all well pleaded facts in the bill of complaint, and the motion gives the proponents of the bill of complaint every reasonable inference that can be drawn from its allegations in their favor. *Sullivan* v. *Iron Silver Mineral Co.,* 109 U. S., l. c. 555; *Compagnia Italiana Transporto Olii Minerali* v. *Sun Oil Co.,* 29 Fed. (2d) 744; *New York L. Ins. Co.* v. *Bidoggia,* 17 Fed. (2d) 112; *Western Ranches* v. *Custer Co.,* 89 Fed. 577; *Federal Reserve Life Ins. Co.* v. *Gregory,* 132 Kans., l. c. 132; *Gano* v. *Cunningham,* 88 Kans., l. c. 302; *Stewart* v. *Balderston,* 10 Kansas, l. c. 148; 49 C. J. 668, par. 946.

The facts as alleged in the bill of complaint are the facts before this Court for consideration.

2.

The exempting from the provisions of the act of motor carriers who operate wholly within a city or village of the state is unconstitutional and void and violates the Fourteenth Amendment to the Constitution of the United States.

The exemption from the provisions of the act of motor carriers who operate wholly within any city or village of the state, appellants contend is an arbitrary exemption and works a discrimination against appellants.

Appellants contend that this exemption is arbitrary and discriminatory between the motor carriers from plants located outside of the state or the city and village, and motor carriers from plants located inside the city or village. Those outside the city or village are subject to tax while those within the city or village operating in the same place are exempt from tax.

That the exemption is arbitrary and discriminatory in that it exempts from the requirements and rules and regulations of the Public Service Commission motor carriers operating wholly within the city or village while it subjects motor carriers operating from outside the state or the city or village to such rules and regulations while operating in the same city or village.

That the exemption is arbitrary and discriminatory in requiring licenses and insurance on motor carriers operating from outside the state or the city or village while exempting those in the city from said licenses and insurance while operating in the same city or village. *Smith* v. *Cahoon*, 283 U. S. 553; *Louisville Gas & Electric Co.* v. *Coleman*, 277 U. S. 32; *Royster-Gucano Co.* v. *Virginia*, 253 U. S., l. c. 415, 40 S. Ct. 560; *Martin* v. *District of Columbia*, 205 U. S., l. c. 139, 27 S. Ct. 440; *Gast Realty Co.* v. *Schneider Granite Co.*, 240 U. S., l. c. 58, 36 S. Ct

254; *Kansas City Southern Ry.* v. *Road Improvement District,* 256 U. S., l. c. 660, 41 S. Ct. 604; *Houck* v. *Little River Drainage District,* 239 U. S., l. c. 262, 36 S. Ct. 60.

3.

The exemption from the provisions of the act of private motor carriers who operate within a radius of 25 miles beyond the corporate limits of such city or village is unconstitutional and void and violates the Fourteenth Amendment to the Constitution of the United States.

The exemption from the provisions of the act of private motor carriers who operate within a radius of 25 miles beyond the corporate limits of such city or village is arbitrary and discriminatory and violates the Fourteenth Amendment to the Constitution of the United States.

The act exempts private motor carriers who operate within a radius of 25 miles of such city or any village in the state from the tax, from the rules and regulations of the Public Service Commission, from the requirements of license and insurance.

The result of this provision is that around each city or village of the state is a different sized, different shaped exemption area of 25 miles free from the requirements of the act. Private motor carriers who do not have plants located in this particular city or village are required to pay taxes and are subject to the rules and regulations of the Public Service Commission, must take out a license, must give a bond while operating in this area. Private motor carriers operating from within the city of the radius are free from these requirements. Not only is this provision arbitrary and discriminatory between private motor carriers from within such city or any village and those

from without the state, such city or village, but it also discriminates and gives a wider area of exempted operation to the larger cities over the smaller cities.

In this exempted area beyond the city limits of each city the city has no jurisdiction or control, the roads are not maintained by the city and public safety regulations are not enforced by the city. There is no public safety reason, taxation reason or regulatory reason why this should be exempted area. The area is purely an arbitrary and discriminatory exemption not based upon any reason or distinction and is therefore unconstitutional and void.

(Cases cited under point 2.)

4.

The exemption of private motor carriers in the transportation of live stock and farm products to market by the owner thereof and supplies for his own use in his own motor vehicle is unconstitutional and void.

The exemption from the provisions of the act of private motor carriers in the transportation of live stock and farm products to market by the owner thereof for his own use in his own motor vehicle is not an exemption given to the tillers of the soil, based on the theory that they are producers and the article is a production. This provision exempts the transportation of live stock and farm products to market by the owner thereof, which shows that the carriers exempted need not be the producer, the owner may not be the stock raiser, not be the farmer who planted and raised the farm product.

"Supplies for his own use in his own motor vehicle" does not restrict this to the farmer but includes every private motor carrier of property who goes out to the

farm and elsewhere from the city and transports to his place of business supplies for his own use.

This exemption is arbitrary and discriminatory in that it exempts from the provisions of the act and the requirements of the act any private motor carrier of property who complies with the three requisites of this exemption, that is: that the products carried are live stock, farm products, or supplies for his use; that they are owned by the carrier; and that they are transported in his own motor vehicle.

(Cases cited under point 2.)

5.

The exemption of private motor carriers operating in the transportation of children to and from school is unconstitutional and violates the Fourteenth Amendment to the Constitution of the United States.

The exemption of private motor carriers operating in the transportation of children to and from school is discriminatory and arbitrary in that it frees from the public safety provisions of the act and the regulatory provisions of the act, carriers who should be subject to the utmost regulations and the highest safety provisions.

(Cases cited under point 2.)

6.

Section 2 of said act in conjunction with the other sections of the act is unconstitutional in that it fails to define with a sufficient degree of certainty the obligation the state imposes upon appellants.

The act by its own terms fails to expressly distinguish the provisions properly applicable to the various classifi-

cations of carriers, and also fails to expressly distinguish the exemptions properly applicable to the various carriers classified as private motor carriers of property, and is therefore void for uncertainty. The act places the burden of interpretation on the appellants at the peril of criminal prosecution. *Smith* v. *Cahoon,* 283 U. S. 553.

7.

Sections 5, 8, 16, 17, 19, 22 and 23 of said act give to the Public Service Commission powers far in excess of those authorized by the Constitution of the United States and the laws of the United States with respect to private motor carriers of property.

The act requires private motor carriers of property to obtain a license from the Public Service Commission as a condition precedent to the right to use the highways of the state, and subjects such private motor carriers of property to regulations which can only be imposed on common carriers, which requirements are beyond the power of the state, and unconstitutional. *Smith* v. *Cahoon,* 283 U. S. 553; *Producers Transport Company* v. *Railway Commission,* 251 U. S. 228; *Michigan Public Utility Commission* v. *Duke,* 266 U. S. 570; *Frost* v. *Railway Commission of California,* 271 U. S. 583.

8.

Section 21 of said act in conjunction with Section 2 of said act is unconstitutional and void and violates the Fourteenth Amendment to the Constitution of the United States.

Section 21 of the act requires as a condition precedent to the issuance of a license to the appellants that the appellants shall furnish "a liability insurance policy in

some insurance company or association authorized to transact business in this state, in such reasonable sum as the Commission may deem necessary to adequately protect the interests of the public with due regard to the number of persons and amount of property involved, which liability insurance shall bind the obligors thereunder to pay compensation for injuries to person and loss of or damage to property resulting from the negligent operation of such carriers," but exempts from such requirement motor carriers who shall operate wholly within any city or village of the state, "private motor carriers who operate within a radius of 25 miles beyond the corporate limits of such city, or any village; nor to the transportation of livestock or farm products to market by the owner thereof, or supplies for his own use in his own motor vehicle; or to the transportation of children to and from school."

Section 21 further provides: "No other or additional bonds or licenses than those prescribed in this act shall be required of any motor carrier by any city or town or other agency of the state." Appellants contend that the above provisions of the act being arbitrary and discriminatory between private carriers themselves makes the act unconstitutional and void. *Smith* v. *Cahoon*, 283 U. S. 553.

VI.

ARGUMENT.

1.

Appellees' motion to dismiss appellants' bill of complaint admits the truth of all well pleaded facts in the bill of complaint and every reasonable inference in appellants' favor that is deducible from them.

Appellees' motion to dismiss is of the form and serves the purpose of a motion for judgment on the pleadings, and is in the nature of a demurrer attacking the cause of action pleaded in the bill of complaint. Under the rules of pleading in the federal courts and the courts of the State of Kansas, such a motion admits the truth of all well pleaded facts in the bill of complaint. The motion is also construed as giving to the proponents of the bill of complaint every reasonable inference that can be drawn from the allegations in the bill in their favor. *Sullivan* v. *Iron Silver Mineral Co.,* 109 U. S., l. c. 555; *Compagnia Italiana Transporto Olii Minerali* v. *Sun Oil Co.,* 29 Fed. (2d) 744; *New York L. Ins. Co.* v. *Bidoggia,* 17 Fed. (2d) 112; *Western Ranches* v. *Custer Co.,* 89 Fed. 577; *Federal Reserve Life Ins. Co.* v. *Gregory,* 132 Kans., l. c. 132; *Gano* v. *Cunningham,* 88 Kans., l. c. 302; *Stewart* v. *Balderston,* 10 Kans., l. c. 148; 49 C. J. 668, par. 946.

The motion to dismiss alleged no facts (R. 21-22), so that the allegations of the bill of complaint in this case become the facts before the Court for legal construction. These facts and those facts that are of common or judicial knowledge are the only facts before the Court.

Appellants have been unable to find in the record any allegation that shows: The number, size, power or speed

of appellants' trucks; the safety or menace of these trucks; the usual or unusual wear of appellants' trucks on the highways of Kansas; whether flour mills or packing houses use trucks, and if so, the method of their use; the method, extent or seasonable use of the highways by farmers; that appellants keep books, and that farmers do not; that the bill as originally presented fixed the exemption limit at three miles, and that the 25-mile exemption was the result of a compromise; that there was some support in the Legislature for a flat 50-mile exemption as contained in the North Carolina statute. Anything with respect to the percentage of accidents occasioned by sleepy drivers; whether or not appellants' objection to the law is merely to the payment of the tax.

Appellants attack the constitutionality of Chapter 236 of the Laws of Kansas, 1931, based on certain allegations in their bill of complaint.

Appellees, conceding these to be the facts in the case, filed a motion to dismiss, and asked the Court on these facts to dismiss the bill of complaint.

A statutory three-judge federal court sustained appellees' motion and dismissed appellants' bill of complaint. The facts then before the Court are the facts alleged in the bill of complaint.

2.

The exemption from the provisions of the act of motor carriers who operate wholly within any city or village of the state.

At the outset appellants recognize the principle that a state has broad discretion in classification in the exercise of its power of regulation (*Smith* v. *Cahoon*, 283 U. S., l. c. 566).

This discretion of a state in classification in the exercise of its power of regulation, however, must not contain discriminations which are entirely arbitray. As Chief Justice Hughes says in *Smith* v. *Cahoon, supra,* l. c. 566-7:

> "But the constitutional guarantee of equal protection of the laws is interposed against discriminations that are entirely arbitrary."

In order not to violate Section I of the Fourteenth Amendment to the Constitution of the United States an act of a state must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike. *Smith* v. *Cahoon, supra; Louisville Gas & Electric Co.* v. *Coleman,* 277 U. S. 32; *Royster-Gucano Co.* v. *Virginia,* 253 U. S., l. c. 415, 40 S. Ct. 560; *Martin* v. *District of Columbia,* 205 U. S., l. c. 139, 27 S. Ct. 440; *Gast Realty Co.* v. *Schneider Granite Co.,* 240 U. S., l. c. 58, 36 S. Ct. 254; *Kansas City Southern Ry.* v. *Road Improvement District,* 256 U. S., l. c. 660, 41 S. Ct. 604; *Houck* v. *Little River Drainage District,* 239 U. S., l. c. 262, 36 S. Ct. 60.

The contention of appellants is that the exemption of motor carriers who operate wholly within any city or village of the state violates Section I of the Fourteenth Amendment to the Constitution of the United States in that it discriminates against appellants and other carriers in the following particulars:

1. Motor vehicles that operate wholly within a city or village of the state are exempted from the payment of the tax. Appellants' trucks from plants located out-

side of the state, or not in a city or village of the state, are required to pay the tax while operating within the same city or village in the state.

2. Motor carriers operating wholly within a city or village in the state are exempt from the requirements and rules and regulations of the Public Service Commission. The trucks of appellants from plants located outside of the state or not located in any city or village of the state while operating in the same city or village are subject to such rules and regulations.

3. Motor carriers operating wholly within any city or village in the state are exempt from the requirements of licenses and insurance. Appellants' trucks from plants outside the state, or not located in a city or village in the state, are subject to the provisions with respect to licenses and insurance while operating in the same city or village.

In *Louis* v. *Boynton,* 53 Fed. (2nd), l. c. 473, Judge Phillips disposes of this contention with the statement:

> "Eighty per cent or more of the tax is to be used to create a fund for reconstruction and maintenance of highways. Such fund will be entirely expended outside of the corporate limits of cities and villages. It is obvious, therefore, that motor carriers operating wholly within a city or village will not receive any direct benefit therefrom, and just reason exists for exempting them from the tax."

In the case at bar, Judge McDermott disposes of it as follows, l. c. 352:

> "There can be no serious question as far as the exemption applies to those vehicles operating wholly within any city or village of the state. As to pri-

> vate carriers, this is primarily a taxing statute, and since city streets are neither constructed nor maintained by the state there is no reason why the state should exact a charge for vehicles which do not use the state highways; nor is there as much occasion for the state to enact statutes looking toward their safe operation in localities where such operation may be controlled by city ordinance."

In other words, these opinions of the courts hold this exemption as constitutional because the maintenance of the streets of the cities and villages of the state is left to those cities and villages, and the sum from this tax is for the purpose of maintaining state roads. The court overlooks the fact that its decision requires the non-resident baker to pay this tax, while operating wholly within a city or village of the state, while the local baker pays no such tax.

The court has overlooked the fact that any non-exempted truck may pass through a number of cities and villages, and is forced to pay a tax for the mileage in these cities and villages, which tax does not go for the maintenance of the roads in the cities or villages, and that the only justification under the commerce act on interstate commerce, and the Fourteenth Amendment to the Constitution for such a tax is as compensation for the use of the highways which in this case it is not.

The court overlooks the fact also, that the regulatory and public safety and indemnity features of the act comprises a large part of the act. It is common knowledge that more motor vehicles operate in the cities and villages in the state than operate on the state highways. The exempting from the requirements or regulation of licenses and of insurance of the majority of the motor vehicles, where these regulations are most important, is a dis-

crimination against the motor vehicle and its operator in the region where the requirements for safety, regulation and insurance are less necessary.

Further considering this exemption as well as all of the other exemptions in Section 2 in conjunction with the last sentence of Section 21 of the act which provides:

> "No other or additional bonds or licenses than those prescribed in this act shall be required of any motor carrier by any city or town or other agency."

This provision of the act is susceptible of only two possible constructions: First, that the law prohibits any other licenses or bonds than those required by the act; or, second, that if one license is taken out or one bond given, no additional license or bond shall be required of that person for that particular truck. In the opinion in this case the court disposes of this contention as follows, l. c. 357:

> "Plaintiffs complain that the last sentence of Section 21 provides that no city shall require any additional bond. It seems to be fair to say that if one bond is given another shall not be required. But plaintiffs are not hurt by this. They can give all the bonds they wish, without let or hindrance."

This would infer that the court construes the act according to the second alternative above.

If the act is construed on the first alternative, that is, to prohibit any other licenses or bonds than those required by the act, then clearly the reasoning given by the court throughout its opinion in the case as to the constitutionality of the act is at fault, and the act itself makes an arbitrary distinction as to licenses and

bonds which are given as a public safety measure between those who operate outside of the city and those that operate in the city, when as a matter of fact it is common knowledge that public safety measures are of a greater necessity in more densely populated districts.

If this provision of the act is construed as the court construes it, then the truck which operates wholly within any city or village in the state is not required to take out a license or give a bond under the act, but is required to take out a bond and license should they be provided by the city or village. Another truck which operates outside of the city limits of the city or village is required to take out a license and give bond under the act, but is exempted from the license or bond required by the city or village. There is no showing whether or not any city or village requires any license or bond, and if so, the fee for the license and the amount of the bond. It may be equal to, greater than or less than the provisions of the act. If greater or less than provisions of the act, then two trucks operating out of the same plant in the same city or village may have different requirements, first, for license and amount of bond, than another truck operating out of the same plant. Or if the city or village has no provision with respect to licenses and bonds, then one truck which operates beyond the city limits must have a license and give bond, and another truck which operates to a greater extent within the city or village gives no license or bond. The basis for this provision of the act is stated by the courts as a public safety measure. Either construction of the act destroys that purpose absolutely and discriminates between the two trucks operating out of the same plant in the same city, as well as plants of different

persons located in the same city, and from the standpoint of the non-resident of the city or village, makes a more apparent discrimination.

The case of *Smith* v. *Cahoon* passes directly on the points involved in these exemptions under Section 2 of the act, where Chief Justice Hughes says in that case, l. c. 567:

> "So far as the statute was designed to safeguard the public with respect to the use of the highways, we think that the discrimination it makes between private carriers which are relieved of the necessity of obtaining certificates and giving security, and a carrier such as the appellant, was wholly arbitrary, and constituted a violation of the appellant's constitutional right. 'Such a classification is not based on anything having relation to the purpose for which it is made.' *Air-Way Electric Appliance Corporation* v. *Day*, 266 U. S. 71, 85, 45 S. Ct. 12, 15, 69 L. Ed. 169; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 563, 564, 22 S. Ct. 431, 46 L. Ed. 679; *Southern Railway Co.* v. *Greene*, 216 U. S. 400, 417, 30 S. Ct. 287, 54 L. Ed. 536, 17 Ann. Cas. 1247; *Truax* v. *Corrigan*, 257 U. S. 312, 332, 333, 42 S. Ct. 124, 66 L. Ed. 254, 27 A. L. R. 375; *Louisville Gas & Electric Co.* v. *Coleman*, 277 U. S. 32, 37, 48 S. Ct. 423, 72 L. Ed. 770."

Appellants therefore respectfully contend that the exemption of motor vehicles operating within cities and villages in the state from the provision of the act is in violation of the Fourteenth Amendment to the Constitution of the United States.

3.

The exempting from the provisions of the act private motor carriers who operate within a radius of 25 miles beyond the corporate limits of such city or any village, is unconstitutional and void, and violates the Fourteenth Amendment to the Constitution of the United States.

In addition to exempting all motor vehicles who operate wholly within a village or city of the state, the second clause of the act exempts all private motor carriers of property who operate within a radius of 25 miles beyond the corporate limits of such city or any village.

The facts show that two of appellants have plants in the state; and all have plants outside of the borders of the state of Kansas.

In the Louis case the action was brought by contract carriers, and this issue was not presented to the court, as it applies only to private motor carriers. In the Louis case, however, l. c. 473, the court recognized this distinction and said:

> "There may be just cause for a non-exempted private carrier to object to the exemptions in Section 2, but we see no grounds for objection by a carrier who transports property or passengers for hire."

In the case at bar, Judge Kennamer in his dissenting opinion held this provision of the act unconstitutional.

In the majority opinion in the case at bar the court says, l. c. 355:

> "The 25-mile exemption is probably sustainable on the ground that the trucks exempted are domiciled in and generally use the city streets; indeed they

must use them to get to the city limits; and such trucks are subject to the control of the city authorities in these respects. Again, plaintiffs' trucks are exempted within the zone as are all others like situated."

And further, l. c. 358-9:

"The argument of plaintiffs, particularly as to the twenty-five-mile exemption, is logically strong, although we do not see how it works any real discrimination against them, since all within the zone are treated alike. The real objection of the plaintiffs is to the payment of the tax; but the tax is reasonable in amount, and those who, like plaintiffs, constantly use the highways as an adjunct to their business, ought to pay their share of maintenance. The question of constitutionality of this statute is not free from doubt; but the rule is as settled as it is sound, that in case of doubt the statute should be upheld."

From this it is seen that the court, both in the Louis case and this case are very dubious about the constitutionality of the exemption of a radius of twenty-five miles around cities and villages.

The contention of appellants is that an exemption of one mile, five miles, twenty-five miles or all of that portion of the state of Kansas west of the 6th P. M. is arbitrary, discriminatory and void, and not based on anything having a relation to the purpose for which it was made. (Cases cited under point 2.)

If the reason that the exemption was included in the law was that the roads were built under the benefit district plan, and many of the users had been called upon to pay a large amount for the construction and maintenance of those highways, and that therefore such users

should be relieved of further cost for such use, then the act clearly discriminates between such users and those who are taxed under the act. The basis for the assessment of cost of local improvements is the increased value brought to the property, and under the decisions of the courts such an assessment is constitutional only when benefits that accrue to the property are assessed. This benefit does not include use, and if this theory is correct, then the users have already received the benefit that they paid for, *i. e.*, the increased value of their property, and would receive an additional benefit, the right to use the roads for which they would not have to pay.

If the 25-mile limitation is attempted to be justified on the basis of the cost and expense of administration, this reason does not apply because it does not eliminate a small user should he get over the 25-mile limit, and still permits the extensive user operating within the 25-mile limitation a mileage of many hundred square miles exempted and not subject to the payment of the tax. The small user may make one trip only and that 26 miles in a straight line from the limits of the city or village on which he would pay some fraction of a cent's tax, which is less than the cost of administration, while the daily user may operate many thousand miles within the exempted area without the payment of any tax. Had it been the intention of the legislature to exempt the small user on the basis of the cost of administration, then the only method justified and which would have been fair and reasonable would have been to have exempted so many miles of operation.

Again, taking this exemption, in conjunction with Section 22, which requires liability insurance, and the rules and regulations as set forth in Sections 5, 16, 18,

19, 20, 22 and 23 of the act, this liability insurance and these rules and regulations are cleary public safety measures, and have nothing to do with the cost of administration nor seasonal or incidental use of the highways. The exemption from the requirement of these provisions of motor carriers who operate within a radius of 25 miles beyond the limits of a city or village where these rules are more needed than at a greater distance from the city or village, is a discrimination and unconstitutional for the reasons so ably set forth in the Cahoon case.

The court, in the opinion in this case above quoted, says: "* * * all within the zone are treated alike." In other words, carried to an absurdity, had the act read: All private motor carriers of property who operate west of the 6th P. M. of the state of Kansas are exempt from the provisions of this act, then the same argument would apply; that is, all east of the 6th P. M. are treated alike, and all west of the 6th P. M. are treated alike. Under the construction of this exemption of the act by the court a radius of 25 miles is drawn around the complete limits of every city or village in the state of Kansas, and private motor carriers operated by persons whose home city or selected base is within that radius pay no tax. Should they by chance break over the boundary of this circle, then they pay only for the territory which lies without the 25-mile boundary.

The purpose of this act as stated by the court in this and the Louis cases, is to provide a tax for the use of the highways as additional compensation to the state of Kansas over the present gasoline and other taxes. The cities and villages of the state take care of their own roads and streets. Outside of the cities and villages the state of Kansas must tax everyone uniformly and

not arbitrarily for the use of the highways. To exempt one mile outside of the cities and villages of the state of Kansas, would be discriminatory and unfair, as well as arbitrary. The same can be said of five, ten, fifteen, twenty-five or one hundred miles, all of which would likewise be an arbitrary figure, and therefore void. It is a matter of common knowledge that there is more traffic within the cities and villages and around the limits of the cities and villages than at a greater distance therefrom. It is likewise common knowledge that the more a road is used the sooner it becomes destroyed and needs repairs. If the tax is not to be discriminatory or arbitrary, the vicinity near the cities should be taxed as much as the outlying districts. The test in all of these cases is: "Is the classification based upon anything having relation to the purpose for which it is made?" (Cases cited.)

That this argument is sound is shown by the majority opinion in this case, l. c. 354, where the court says:

> "The records disclose that, when the bill was originally presented, its limit was fixed at three miles, which would take in the outlying trade territory of most of the cities, although there are some that extend beyond that. There was some support for the flat 50 miles exemption contained in the North Carolina statute. The result was the compromise contained in this section."

Certainly then, if the 25-mile exemption is the result of a compromise as to distance, then the classification does not rest upon some ground of difference having a fair and substantial relation to the object of the legislation.

The arbitrary distance of 25 miles has no relation to the purpose for which the law of the state of Kansas was passed.

The opinion of the court in this case says, l. c. 359:

"* * * all within the zone are treated alike."

Does the court mean by that "all within the particular zone within the city"? If not, then within the state of Kansas no two zones located within different cities or villages, or outside of a city or village is treated the same as any other zone. It is a mathematical fact that a 25-mile radius around a large object contains a greater area than a 25-mile radius around a small object. As a hypothetical case, apply the law to a small circular village in the state of Kansas whose distance from the central portion to the city limits is one mile. According to the opinion of the court, a private motor carrier whose home city or base was within this city, would be exempted from the provisions of the act for a radius of 25 miles beyond the city limits, or a total area of approximately 2,123 square miles free from taxation. The area of the village would be 3.1416 square miles. So on this basis the exemption of the private motor carrier located in this village would cover approximately 2,120 square miles.

As opposed to this, consider a circular city whose limits were ten miles from the center of the city. The private motor carrier located in this city, or whose base was there, would have a radius free from the provisions of the act of 35 miles from the center of the city, or a total of approximately 3,848 square miles from taxation. Deducting likewise, the area of this city which would be 314 and a fraction square miles, the private motor

carrier in this city would have an exempted area outside of the city limits of approximately 3,534 square miles as compared with 2,120 square miles of the private motor carrier coming from the smaller village—a difference of approximately 1,414 square miles of exempted territory in favor of the private motor carrier from the larger city outside the boundaries of such city. Applying the act and this exemption to the plants of petitioners, the plant of petitioner located in Hutchinson, Kansas, would have less square miles of area free from the exemptions of the act than the plant of the same company located in Wichita, Kansas. And the plant of appellant located in Topeka, would have a greater exempted area outside the corporate limits of the city of Topeka than the plant of its competitor in Hutchinson, Kansas. The effect of 25 miles exemption in this respect is to discriminate between every city, town and village in the state of Kansas. There is further a discrimination in favor of the larger cities as over the smaller cities and villages of the state.

Further, consider the law with respect to a plant located not within a city or village of the state. Such a plant would have no exemption and no area over which it could operate free from the provisions of the act. Consider the plants of appellants located outside of the borders of the state of Kansas; they have no exemptions unless as suggested by the court in its opinion, they establish a home base in some city or village in the state of Kansas, and are subject to the provisions of the act going to and from this home base. This constitutes a discrimination between the resident and non-resident.

All of the above exemptions have been based upon cities that are circular in form. It is a recognized fact that no city limits of any cities or villages are in a

regular shape. Nor is any city or village uniform or included within a circle. It is a mathematical fact that a 25-mile exemption around an irregular object is either larger or smaller than the 25-mile limit around a circular object of the same area. A 25-mile radius around a square, rectangle, or any polygon, is a different area even though the area of the square, rectangle or polygon be the same. It is also a mathematical certainty that a 25-mile radius around an irregular body, particularly if the area of the irregular body extends up into points, is much greater than the same 25 miles radius around a circle.

The Kansas law with respect to treating all alike discriminates as to exemptions in every city or village of the state, favoring the larger city over the smaller city, and favoring the irregular shaped city over those cities whose boundaries are regular.

The opinion of the court meets this point by referring to the case of *Chicago, R. I. & P. Railway Co.* v. *United States,* 52 S. Ct. 87, 91, which was a case based upon the propriety of classification predicated upon difficulty of administration and accounting. Appellants fail to see the applicability of this case to this point.

The court cites the case of *Clark* v. *Maxwell,* 197 N. Car. 604, which was affirmed without opinion in 282 U. S. 811. In that case the laws of North Carolina, 1929, Chapter 346, Section 167, Sub-Section 3, provide for license taxes, and then provides:

> "Every person * * * engaged in the business of operating automobiles * * * for the transportation of property over the public highways of this state for compensation between termini for a distance greater than fifty miles * * *."

This is not an analogous point; this is a specific exemption based upon distance traveled. As the court says in conclusion in distinguishing this from other similar cases to the case at bar:

> "In this case the classification, for purposes of taxation, is reasonable, and there is no exemption. There is, therefore, no unjust discrimination."

The case of *Carley & Hamilton* v. *Snook,* 281 U. S. 66, was a case based upon the California act (Motor Vehicle Act of California, 1923, California Statutes [c] 266, as amended, 1927, California Statutes [c] 884). The Act is based upon the weight of the trucks and has nothing to do with 25 mile or other limits. Likewise each of the other cases cited by the court can be distinguished from the case at bar as based on the classification basis of taxation and not discriminatory. The question of taxation alone seems to be involved, while in the case at bar, not only taxation but the question of regulations, licenses and bond, and the public safety, is a large part of the act.

The court relies in its opinion on the case of *State ex rel* v. *Kozer,* 116 Oregon 581, the only case appellants can see that bears on the issues in this case. In that case the Supreme Court of the State of Oregon bases its decision on this reasoning:

> "But, say petitioners, 'why make it a five mile limit? Why not ten, twenty or thirty miles?' With like propriety we might ask: 'Why did the Legislature require a certain license fee for an automobile having a weight of 2,000 pounds? Why not fix the fee on a basis of 3,000 pounds? Such matters rest within the discrimination of the Legislature, and are not subject to review when their purpose is in keeping with the general legislation of the state in build-

ing and maintaining roads. If it is reasonable to require a greater fee for the operation of heavier automobiles because of damages sustained by the roads, it is likewise just and equitable to exact higher fees of owners who are given the right and privilege of operating their motor vehicles over a greater extent of highways. This law makes no distinction among those of the same class. It treats all alike who are similarly situated, and thereby meets the constitutional requirement that all citizens must be given equal protection of the laws."

And cites as supporting this doctrine the case of *Keeney* v. *N. Y.*, which was decided in the Supreme Court of the United States on January 9th, 1912, in which "a graduated tax was imposed by the New York Statute of 1896 upon the transfer of property, real or personal * * * or of any interest therein or income therefrom in trust or otherwise." Mr. Justice Lamar rendered the opinion in that case.

There is nothing in *Kenney* v. *New York* that has anything to do or the remotest connection with the exemption of five miles or any other area.

The case of *State* v. *Kozer* did not go to the Supreme Court of the United States. The reasoning of the court indicates that the court considered constitutional a 5-mile exemption, a 10-mile exemption, a 20-mile exemption, a 30-mile exemption and so on to the exemption cited to this Court based on the 6th Principal Meridian.

The reasoning of the court based upon the different wear and tear to the roads of a heavier over a smaller truck the court did not consider. Nor did it discuss the discrimination that arbitrary, discriminatory, unequal exemptions such as a 5-mile limit or multiples or fractions thereof would make. If this portion of the Oregon case is the law, then the Fourteenth Amendment to the Con-

stitution of the United States, and the hundreds of decisions thereon with respect to arbitrary and discriminatory acts, are nullified.

The decision in the case of *State* v. *Kozer* is against appellants' contention, and contrary, as appellants contend, to the ruling of this Court in construing Section I of the Fourteenth Amendment to the Constitution of the United States. In the opinion in this case the Court says, l. c. 355:

> "Of course, twenty-five miles is further than five miles; and it does seem that a twenty-five mile exemption, even for facility of administration, is pretty far. But if the state has the power to create this penumbra about the city, the question of the distance must be left to the legislature unless it is clearly arbitrary."

Lastly, taking the exemption of 25 miles beyond the city limits of the city or village in connection with the last sentence of Section 21 of the Act, which is discussed under Point II of this brief, and which exempts carriers operating in this territory from the obligation of licenses and bonds, it is certainly true that the reason given by the court for considering this exemption, that is, that the city or village itself would require bonds and licenses, does not apply in this instance, as no city or village has any jurisdiction outside the limits of that city or village. The extension of the exemption of 25 miles beyond the city limits might result in a truck giving a city license and bond as protection to the public safety within the city or village, and then have this territory outside of the city limits for 25 miles in which they give no license or bond either under this act or as required by the city. Every other truck operating from outside of the state from any other city or village in the state into this 25-mile radius around the

city which is exempted would be required to take out this license and give this bond. One of the principal contentions of appellants with respect to this 25-mile exemption is with respect to the public safety provisions thereof. In the case of *Smith* v. *Cahoon, supra,* l. c. 566, 567, Chief Justice Hughes says:

> "But the constitutional guaranty of equal protection of the laws is interposed against discriminations that are entirely arbitrary. In determining what is within the range of discretion and what is arbitrary, regard must be had to the particular subject of the state's action. In the present instance, the regulation as to the giving of a bond or insurance policy to protect the public generally, in order to be sustained, must be deemed to relate to the public safety. This is a matter of grave concern as the highways become increasingly crowded with motor vehicles, and we entertain no doubt of the power of the state to insist upon suitable protection for the public against injuries through the operations on its highways of carriers for hire, whether they are common carriers or private carriers. But, in establishing such a regulation, there does not appear to be the slightest justification for making a distinction between those who carry for hire farm products, or milk or butter, or fish or oysters, and those who carry for hire bread or sugar, or tea or coffee, or groceries in general, or other useful commodities. So far as the statute was designed to safeguard the public with respect to the use of the highways, we think that the discrimination it makes between the private carriers which are relieved of the necessity of obtaining certificates and giving security, and a carrier such as the appellant, was wholly arbitrary, and constituted a violation of the appellant's constitutional right. 'Such a classification is not based on anything having relation to the purpose for which it is made.'"

And this is the basis of the dissenting opinion of Judge Kennamer in the case at bar, where he says, l. c. 359:

> "I concur in the opinion of the majority in so far as the same construes the Kansas Highway Act that the statute has as its purposes the regulation of the highways and taxation.
>
> I dissent from the views expressed by the majority sustaining the constitutionality of the act. The exemption of motor carriers who operate within radius of 25 miles beyond corporate limits of any village or city is an unreasonable discrimination in favor of such operators. The necessity for the protection of the public on the highways within radius of 25 miles is just as great or greater as beyond such radius, as the probabilities of damage to persons or property would be more likely than beyond such radius. The case of *Smith* v. *Cahoon*, 283 U. S. 553, 51 S. Ct. 582, 75 L. Ed. 1264, seems to me to be controlling."

Appellants respectfully contend that the exemption from the provisions of the act of private motor carriers who operate within a radius of 25 miles beyond the corporate limits of a city or village is unconstitutional and void, is arbitrary and discriminatory, and in violation of Section I of the Fourteenth Amendment to the Constitution of the United States.

4.

The exemption from the provisions of the act of the transporation of live stock and farm products to market by the owner thereof, or supplies for his own use in his own motor vehicle, is unconstitutional and void, and violates the Fourteenth Amendment to the Constitution of the United States.

The Court says in the opinion in this case on this point, l. c. 353:

> "We think the legislature had a right to take into consideration the fact that as business is now conducted the transportation of live stock and farm products to market by the owners occasions but a casual and infrequent use of the highways, while the transportation of the finished product to the ultimate consumer is accomplished generally by the sellers, and that their use of such highways is habitual and constant."

Appellants contend that not only is this exemption void, but that in its opinion the court in this case has not considered the full import of this exemption of the act. Not only does the act exempt the farmer or the producer, but includes any owner of live stock and farm products being transported to market. The three essentials are: That the products must be live stock and farm products, that they must be owned by the carrier, and transported in his own motor vehicle. This permits any person who owns live stock or farm products to transport them to market free of the tax. The live stock commission merchant can go out and buy live stock and haul it to market free of tax; the elevator owner, the miller, the manufacturer of food products can got out and buy farm products, such as wheat, corn or oats, and trans-

port them to the mill or market and be exempt from the tax.

The theory on which all exemptions urged give to the tillers of the soil is that they are producers and that the article is a production. It is based upon the theory that the individual who produces such products, being a tiller of the soil, should have the right to bring such products to market and there dispose of them. This exemption in Section 2 of the act does not restrict it to the producer, but makes it possible for the commission merchant, the middleman, or the individual buyer of such products to purchase at the farm, or any other place, and distribute such products to market exempt from the tax.

For this reason the seasonal, incidental, casual and occasional use set forth in the opinion of the court as the underlying principle involved in this exemption does not justify it. This argument also presumes that the use of petitioners is daily and regular, and a distinction exists between the two.

With respect to this argument, as also with respect to the 25-mile limitation discussed under Point 3 of this brief, there are numerous users of the roads who are not engaged in the distribution of their own live stock or farm products whose use of the roads is merely incidental, casual and seasonal. The implement man who delivers his own implements to the farmer that are sold on conditional sales contract or that are taken to the farms for the purpose of demonstration; the filling station man who delivers his gasoline to the farm; the merchant of the city delivering furniture and household goods, and many others too numerous to set forth.

Attention also should be called to the fact that there are farmers who bring and deliver products to the town

daily, and over regular routes, and that such farmers use the highways. The farmer who daily brings his milk, chickens, eggs and garden products to his regular customers in the city is an example of this.

The act exempts "transportation of live stock and farm products to market by the owner thereof," which shows clearly that the carrier exempted need not be the producer of these exemptions. The owner may not be the stock raiser who bred and raised the stock, nor the farmer who planted and raised the farm products. And then continuing the quotation further: "Or supplies for his own use in his own motor vehicle." Does this mean that the owner can transport his own supplies, and if not, under what interpretation of the act can this be restricted to the farmer, and can the farmer only be allowed to transport his supplies, as is inferred from the court's opinion? If the act is interpreted as it reads, it is not restricted to the farmer, and the farmer only cannot be allowed to transport his supplies. If not restricted to the farmer, it means that every private motor carrier of property can go out to the farm, or elsewhere in the state, and transport to his place of business supplies for his own use; that any private motor carrier of property who complies with the three requisites of this exemption, is exempt from the act; that is, that the products carried are live stock or farm products; that they are owned by the carrier; and that they are transported in his own motor vehicle.

The Supreme Court of four states passed upon the constitutionality of this exemption in different forms: The State of Georgia in the *Southern Transfer Company* v. *Harris,* 171 Ga. 358; the State of Oregon in *State* v. *Kozer,* 116 Ore. 581; the State of Minnesota in *State*

v. *LeFebvre,* 174 Minn. 248, and the State of Florida in *Smith* v. *Cahoon,* 99 Fla. 1174.

The Minnesota case seems to be the leading authority in the state courts, and the basis of all the state court decisions on this point.

In the Georgia case, it is cited as the only authority, except a Georgia case based on a local city ordinance. In the Oregon case, no authorities are cited, and in *Smith* v. *Cahoon,* 99 Fla., l. c. 1182, the Minnesota case is cited as the only authority on this point. *Smith* v. *Cahoon* was appealed to this court, and this court overruled the position of the Florida court, and therefore the position of the Minnesota court on which it was based, and of the Georgia court likewise.

From a public safety standpoint as decided in the case of *Smith* v. *Cahoon* and discussed under Point 3 of this argument there is no reason why the transporters of live stock, farm products and supplies should be exempted from the provisions of the act. As a matter of fact, the danger to the general public from the transportation of these products and articles is as great a menace to the public safety as the transportation of any other products and articles and there is just as much need for regulations, licenses and insurance to protect and indemnify the public. The exemption of these products and materials from the effect of the act is arbitrary and discriminatory.

Appellants respectfully contend for the reasons herein given, and the reason stated under Points 2 and 3 of this brief, that the exemption of private motor carriers in the transportation of live stock and farm products by the owner thereof, and supplies for his own use in his own motor vehicle, is unconstitutional, discriminatory

and void, and in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

5.

The exemption from the provisions of the act of motor carriers operating in the transportation of children to and from school is unconstitutional and void, and violates Section 1 of the Fourteenth Amendment to the Constitution of the United States.

This exemption was held constitutional by the court in this case, and in *Louis* v. *Boynton,* l. c. 473. In this case the following reasons are given, l. c. 352:

> "Nor can there be any serious question about the exemption as to the transportation of children to and from schools. This public agency can be fairly exempted from taxation for the same reason that municipal bonds are; the question of the safe operation of such vehicles can be properly left to the school authorities, who are directly responsible therefor."

The court, however, in passing upon this exemption has considered it only from the standpoint of a revenue measure, and it has overlooked the public safety provision which in the case of children is even more important than that of adults. Why in the transportation of children should the act exempt the driver of their vehicle from the regulatory measures of the act. If, as the court says in its opinion, the reason for the act is to prevent sleepy and drunken drivers, then why should the drivers of children to and from school be allowed to be sleepy and drunken, when the drivers of trucks conveying oil, bread and other products must be sober and in full

possession of their senses? What is the reason for the exemption of the driver of children to and from school from the requisites of obtaining a license, giving a bond and being subject to the regulations of the Public Service Commission, when the driver of a different kind of a truck must obtain such license, give a bond, and be subject to these regulations. As a public policy measure and as a public safety measure, reason and logic require a more stringent method of handling immature and inexperienced children than grown adults. If the basis of this exemption is not to be arbitrary and discriminatory, but based upon something real, then public policy and public safety demand greater protection for children than for material products.

Appellants respectfully contend that this exemption is arbitrary and not based upon any reason, and violates Section 1 of the Fourteenth Amendment to the Constitution of the United States.

6.

Either Sections 2, 17, 19, 23 and 24 of the act, taken in conjunction with the entire act, impose upon the appellants obligations to which the state had no constitutional authority to subject them, or they failed to define such obligations with a fair degree of certainty, which is required of criminal statutes.

Section 2 of the act provides for the four exemptions from the provisions of the act as enumerated in paragraphs 2 to 5 of this brief.

Section 17 of the act imposes upon appellants a penalty equal to one-half of one per cent per month of the original fee, makes these a lien upon the personal property of appellants and vehicles of all persons leased by peti-

tioners in their business and provides that property and vehicles may be held under warrant issued by the Commission and sold in accordance with the law applicable to personal property taxes, and that the delinquency shall be the ground for the issuance of a writ of attachment against appellants.

Section 19 of the act provides that a failure to comply with the provisions of said act or the denial to the Commission of access to the books of record shall make appellants guilty of a misdemeanor.

Section 23 of the act provides if appellants violate any provisions of the act, or fail to observe any order, decision or regulation of the Commission, they shall be guilty of a misdemeanor and subject to arrest and prosecution.

Section 24 of the act gives to the county attorney of the State of Kansas the power to prosecute all violations of the act.

Appellants contend that the act as written is so confusing and ambiguous that it is impossible for appellants to properly construe the act, and under the act upon them is placed the burden of properly construing it or being subject to fines and imprisonment. Under the provisions of the act it is impossible for appellants to determine whether they are free from taxation only in the city or village in which their plant is located, or in any city or village in which they operate. Or whether the act means that private motor carriers are exempt from the tax at all times while operating within any city or village in the state.

Under the 25-mile exemption whether a radius of 25 miles beyond the corporate limits of any such city or village is absolutely free from taxation, or becomes a taxable radius when the motor vehicle goes to some point

beyond the 25-mile radius, and then whether or not the entire mileage only outside of the 25-mile radius is taxable, or the entire mileage then covered by the motor vehicle on its entire trip.

With respect to the plants of appellants located outside of the State of Kansas, the act does not provide whether or not said vehicles are taxable on entering the State of Kansas; and if not, whether or not they are entitled to a 25-mile exemption, and if they are entitled to 25 miles exemption, whether it is from a uniform point of entry into the State of Kansas; the nearest point of entry into the State of Kansas; or any point of entry into the State of Kansas.

As Chief Justice Hughes says in the Cahoon case, l. c. 564:

> "Either the statute imposed upon the appellant obligations to which the state had no constitutional authority to subject him, or it failed to define such obligations as the state had the right to impose with the fair degree of certainty which is required of criminal statutes. Considered as severable, the statute prescribed for private carriers 'no standard of conduct that it is possible to know.' *International Harvester Co.* v. *Kentucky,* 234 U. S. 216, 221, 34 S. Ct. 853, 58 L. Ed. 1284; *Collins* v. *Kentucky,* 234 U. S. 634, 638, 34 S. Ct. 924, 58 L. Ed. 1510; *United States* v. *L. Cohen Grocery Co.,* 255 U. S. 81, 41 S. Ct. 298, 65 L. Ed. 516, 14 A. L. R. 1045; *Weeds, Inc.,* v. *United States,* 255 U. S. 109, 41 S. Ct. 306, 65 L. Ed. 537; *Connally* v. *General Construction Co.,* 269 U. S. 385, 391, 46 S. Ct. 126, 70 L. Ed. 322. * * * The Legislature could not thus impose upon laymen, at the peril of criminal prosecution, the duty of severing the statutory provisions

and of thus resolving important constitutional questions with respect to the scope of a field of regulation as to which even courts are not yet in accord."

Again, the act provides for the same tax on a motor truck which travels to a fixed point in the State of Kansas without a load and returns without a load as is charged to a similar truck traveling over the roads of Kansas loaded with a capacity load and returning with no load, or a similar truck to the same point in the State of Kansas with a capacity load, and returning with a capacity load.

As this court says in *Connally* v. *General Construction Company*, 269 U. S. 385:

> "The terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties. A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law."

The court further states, on page 329, as follows:

> "The dividing line between what is lawful and unlawful cannot be left to conjecture. The citizen cannot be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different constructions. A criminal statute cannot rest upon an uncertain foundation. The crime, and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course

it is lawful for him to pursue. Penal statutes prohibiting the doing of certain things, and providing a punishment for their violation, should not admit of such a double meaning that the citizen may act upon the one conception of its requirements and the courts upon another."

Should appellants fail to correctly construe any of the above provisions of the act, they are subject to arrest and prosecution.

Appellants therefore respectfully contend that Chapter 236 of the Laws of Kansas of 1931 is indefinite, discriminatory, and fails to define the obligations imposed upon the appellants with a fair degree of certainty that is required of criminal statutes.

7.

Sections 5, 8, 16, 17, 19, 22 and 23 in conjunction with the other provisions of the act give to the Public Service Commission of the State of Kansas powers far in excess of those authorized by the Constitution of the United States and the laws thereof with respect to private motor carriers of property.

Section 8 of the act requires private motor carriers of property to obtain a license. Section 16 of the act empowers the Commission to inspect the books and documents of private motor carriers of property. Section 17 of the act in addition to requiring the payment of fees, with a penalty, and authorizing the issuing of a warrant, gives the Commission the right to revoke the license for failure to comply with the provisions of the section. Section 19 of the act provides that those who deny the Commission access to books or records shall

be guilty of a misdemeanor. Section 22 of the act gives the Commission the right to publish such regulations as it may deem necessary to properly carry out the provisions of the act, and provides certain rules which shall be promulgated by the Commission regarding the condition of the vehicle, the qualifications and condition of the operator, the hours of service for the operator, and the method of report of accidents, the requirement that each carrier shall have attached to each unit or vehicle such distinctive marking as shall be adopted by the Commission. Section 23 of the act makes anyone who violates any provision of the act, or fails to observe any order, decision or regulation of the Commission guilty of a misdemeanor and provides a fine therefor.

In addition to this, Section 5 of the act provides:

> "The Public Service Commission is hereby vested with power and authority and it shall be its duty to license, supervise and regulate every public motor carrier of property or of passengers in this state and to fix and approve reasonable maximum or minimum or maximum and minimum rates, fares, charges, classifications and rules and regulations pertaining thereto. And the Public Service Commission is hereby vested with power and authority and it shall be its duty to license, supervise and regulate every public motor carrier of property or of passengers, contract motor carrier of property or of passengers and private motor carrier of property in the state and to regulate and supervise the accounts, schedules, service and method of operation of same; to prescribe a uniform system and classification of accounts to be used; to require the filing of annual and other reports and any other data; and to supervise and regulate 'public motor carriers of property or of passengers,' 'contract mo-

tor carriers of property or of passengers' and 'private motor carriers of property,' in all matters affecting the relationship between such *'public motor carriers of property or of passengers,' 'contract motor carriers of property or of passengers'* and *'private motor carriers of property'* and the traveling and shipping public. The Public Service Commission shall have power and authority by general order or otherwise to prescribe reasonable and necessary rules and regulations governing *all such motor carriers*. All laws relating to the powers, duties, authority and jurisdiction of the Public Service Commission over common carriers are hereby made applicable to *all such motor carriers* except as herein otherwise specifically provided" (italics ours).

In the opinion in this case the court construes Section 5 of this act, and particularly the last sentence thereof, to apply only to common carriers.

On the matter of the construction of "all such motor carriers," in the next to the last line of Section 5, the rule of construction is that the word "such" is a pronoun adjective and that the antecedent should agree in person, gender and number. This is a universal rule and we find it in Jesse L. Wheeler's Grammar at Work, new edition; Professor D. V. Marti's English and Use, and Goold Brown's The Grammar of English Grammars. This latter work is used by the lexicographer of the Literary Digest, and is the most quoted and used grammar. The pronoun adjective, "such," agrees with the antecedent "public motor carriers of property or of passengers, contract motor carriers of property or passengers, and private motor carriers of property." In all three respects, the word "motor" is a descriptive adjective and makes positive the particular antecedent re-

ferred to because the various motor carriers, which we contend is the antecedent, are described as motor carriers; then, too, in the preceding sentence, is the same phrase, "all such motor carriers," which without a doubt refers back to the group of carriers, and which unquestionably is the antecedent. Also common carriers, as used in the last clause is a part of the subject of the sentence, and cannot be an antecedent, also if common carriers should be the antecedent, there would be no sense to the provision or the sentence, also the phrase being motor carriers, cannot refer to common carriers because common carriers include all classes of carriers, whether they are motor, steam, rail, steamship, telephone, telegraph, pipe line, or any other class of common carriers. It seems to appellants that the descriptive adjective, "motor," settled the issue.

Appellants have read these provisions of the act and interpreted them according to the English therein with respect to private motor carriers of property. The question is: Does this Act and these provisions give to the Public Service Commission powers over private carriers which are not authorized under the Federal Constitution and amendments. Certainly the wording of the Act gives to the Public Service Commission jurisdiction and provides that all laws relating to the powers, duties, authority and jurisdiction of the Public Service Commission over common carriers are hereby made applicable to all motor carriers except as herein specifically provided.

In the *Cahoon* case, Chief Justice Hughes says, l. c. 563:

> "It is true that the statute does not in express terms demand that a private carrier shall constitute itself a common carrier, but the statute purports to subject all the carriers which are within the terms

of its definition to the same obligations. Such a scheme of regulation of the business of a private carrier, such as the appellant, is manifestly beyond the power of the State."

And before that Chief Justice Hughes says, l. c. 563:

"All carriers within the Act, whether public or private, are put by the terms of the statute upon precisely the same footing. * * *"

It is the contention of appellants that these provisions of the act give to the Public Service Commission powers, rights and responsibilities over private motor carriers of property in excess of those as authorized by law over private motor carriers of property, and equal to, if not exceeding, the powers which they have over common carriers of property. The legislature may not by its declaration make a private motor carrier of property a common carrier and so compel it to devote its property to public use. To do so constitutes a taking of private property for public use without compensation, and violates the Fourteenth Amendment to the Constitution of the United States. *Producers Transport Co.* v. *Railway Commission,* 251 U. S. 228; *Michigan Pub. Utility Com.* v. *Duke,* 266 U. S. 570; *Frost et al.* v. *Railroad Com.,* 271 U. S. 583.

8.

Section 21 of the act taken in conjunction with Section 2 of the act is unconstitutional and void, as discriminatory and arbitrary.

Section 21 of the act requires private motor carriers of property to take out and have approved by the Public Service Commission a liability insurance policy in such reasonable sum as the commission may deem necessary

to adequately protect the interests of the public, and provides that no other or additional bonds or licenses than those prescribed in this act shall be required of any motor carrier by any city or town or other agency of this state. This provision of the act has been discussed fully under Points 2, 3 and 4 of appellants' argument, where it is taken up in connection with the exemption from the provisions of the act of the specifically exempted motor carriers, or motor carriers of property. This provision of the act in addition to being arbitrary, discriminatory and void because of the exemptions above enumerated, likewise extends the power of the state in the regulation of private motor carriers of property. It is only necessary to quote from Chief Justice Hughes's opinion in *Smith* v. *Cahoon,* l. c. 565, where he says:

> "Among the provisions of the statute binding upon those who apply for and obtain certificates of public convenience and necessity is one that a bond or insurance policy, approved by the state commission, shall be furnished in order to afford security for the public against injuries as well as for the protection of persons and property transported. If we leave on one side the requirement that a certificate holder, who is a private carrier, shall give a bond or policy for the goods carried by him, irrespective of his contract with his employer whose goods he carries, and if we consider only the provision for the protection of the public with respect to the use of the highways, another constitutional difficulty is encountered, that is, of an unconstitutional discrimination. If the provisions of the act were treated as severable, and requirements relating to the safety of the public are separately considered, we are brought to the terms of the act with respect to those who are required to obtain certificates of public convenience and necessity and thus to supply the stipulated security. The act provides that the

> term 'auto transportation company,' upon which the obligations of the act are imposed, shall not include 'any transportation company engaged exclusively in the transporting of agricultural, horticultural, dairy or other farm products and fresh and salt fish and oysters and shrimp from the point of production to the assembling or shipping point en route to primary market, or to motor vehicles used exclusively in transporting or delivering dairy products.' The point with respect to this discrimination is not that a distinction is made between common carriers and private carriers, but between private carriers themselves, although they are alike engaged in transporting property for compensation over public highways between fixed termini or over a regular route."

Appellants therefore respectfully urge that Chapter 236, and particularly Section 21 thereof, taken in conjunction with Section 2 of the act, is unconstitutional and void, and denies to appellants equal protection of the law as guaranteed by Article 4, Section 2, of the Constitution of the United States, and Section I of the Fourteenth Amendment to the Constitution of the United States.

VII.

Conclusion.

For the reasons hereinbefore set forth, appellants respectfully urge that Chapter 236 of the Laws of Kansas, 1931, is unconstitutional and void, and respectfully pray that this court reverse the decision of the majority of the statutory three-judge court.

CHARLES R. WILKE,
JOHN C. GROVER,
Counsel for Appellants.

APPENDIX "A."

CHAPTER 236, LAWS OF 1931.

RELATING TO MOTOR CARRIERS AND TO TRANSPORTATION THEREON OVER THE PUBLIC HIGHWAYS.

Senate Bill No. 387.

An Act relating to transportation by motor vehicles over the public highways of Kansas, and repealing all parts of Chapter 206 of the Laws of 1925 and Chapter 222 of the Laws of 1929 (being Sections 66-196 to 66-1,107, inclusive, of the 1930 Supplement to the Revised Statutes of Kansas, 1923), inconsistent or in conflict with this act.

Be it enacted by the Legislature of the State of Kansas:

SECTION 1. (*a*) The term "motor vehicle" when used in this act means any automobile, automobile truck, trailer, motor bus or any other self-propelled or motor-driven vehicle used upon any public highway of this state for the purpose of transporting persons or property. (*b*) The term "public motor-carrier of property" when used in this act shall mean any person engaged in the transportation by motor vehicle of property for hire as a common carrier having a fixed termini or route. (*c*) The term "contract motor carrier of property" when used in this act shall be construed to mean any person not a public motor carrier of property engaged in the transportation by motor vehicle of property for hire as a business. (*d*) The term "private motor carrier of property" when used in this act shall be construed to mean any person engaged in the transportation by motor vehicle of property sold

or to be sold by him in furtherance of any private commercial enterprise. (*e*) The term "public motor carrier of passengers" when used in this act shall mean any person engaged in the transportation by motor vehicle of passengers or express for hire as a common carrier having a fixed termini or route. (*f*) The term "contract motor carrier of passengers" when used in this act shall be construed to mean any person not a public motor carrier of passengers engaged in the transportation by motor vehicle of passengers or express for hire. (*g*) The term "public highway" when used in this act shall mean every public street, road or highway or thoroughfare of any kind used by the public.

SEC. 2. That this act shall not apply to motor carriers who shall operate wholly within any city or village of this state, or private motor carriers who operate within a radius of twenty-five miles beyond the corporate limits of such city, or any village, nor to the transportation of livestock and farm products to market by the owner thereof or supplies for his own use in his own motor vehicle; or to the transportation of children to and from school.

SEC. 3. All "public motor carriers of property or passengers" as defined in this act are hereby declared to be common carriers within the meaning of the public utility laws of this state, and are hereby declared to be affected with a public interest and subject to this act and to the laws of this state, including the regulation of all rates and charges now in force or that hereafter may be enacted, pertaining to public utilities and common carriers as far as applicable, and not in conflict herewith.

SEC. 4. No public motor carrier of property or passengers, contract motor carrier of property or passengers or private motor carrier of property shall operate any

motor vehicle for the transportation of either persons or property for compensation on any public highway in this state except in accordance with the provisions of this act.

SEC. 5. The public service commission is hereby vested with power and authority and it shall be its duty to license, supervise and regulate every public motor carrier of property or of passengers in this state and to fix and approve reasonable maximum or minimum or maximum and minimum rates, fares, charges, classifications and rules and regulations pertaining thereto. And the public service commission is hereby vested with power and authority and it shall be its duty to license, supervise and regulate every public motor carrier of property or of passengers, contract motor carrier of property or of passengers and private motor carrier of property in the state and to regulate and supervise the accounts, schedules, service and method of operation of same; to prescribe a uniform system and classification of accounts to be used; to require the filing of annual and other reports and any other data; and to supervise and regulate "public motor carriers of property or of passengers," "contract motor carriers of property or of passengers" and "private motor carriers of property," in all matters affecting the relationship between such "public motor carriers of property or of passengers," "contract motor carriers of property or of passengers" and "private motor carriers of property" and the traveling and shipping public. The public service commission shall have power and authority by general order or otherwise to prescribe reasonable and necessary rules and regulations governing all such motor carriers. All laws relating to the powers, duties, authority and jurisdiction of the public service commission over common carriers are hereby

made applicable to all such motor carriers except as herein otherwise specifically provided.

SEC. 6. All transportation charges made by any public motor carrier shall be just and reasonable.

SEC. 7. It shall be unlawful for any public motor carrier to operate as a carrier of intrastate commerce within this state without first having obtained from the public service commission a certificate of convenience and necessity. The public service commission, upon the filing of application for such certificate, shall fix a time and place for hearing thereon, which shall not be less than twenty nor more than thirty days after such filing. The public service commission shall cause a copy of such application and notice of hearing thereon to be served at least ten days before the hearing upon an officer or owner of every common carrier that is operating or has applied for a certificate to operate in the territory proposed to be served by the applicant, and on the city clerk of every city into or through which said motor carrier may desire to operate; and any such common carrier or city is hereby declared to be an interested party to said proceedings and may offer testimony for or against the granting of such certificate, and any other interested person may offer testimony at such hearing. If the commission finds from the evidence that the proposed service or any part thereof will promote the public convenience and necessity, the commission shall issue the certificate; otherwise such certificate shall be denied. Before granting a certificate to a public motor carrier, the commission shall take into consideration other existing transportation facilities in the territory for which a certificate is sought, and in case it appears from the evidence that the service furnished by existing transportation facilities is reasonably adequate, the commission shall not grant such certificate.

SEC. 8. It shall be unlawful for any "contract motor carrier of property or passengers" or "private motor carrier of property" to operate as a carrier of property or passengers within this state either in intrastate commerce or in interstate commerce without first having obtained from the public service commission a license therefor. An application shall be made to the public service commission in writing stating the ownership, financial condition, equipment to be used and physical property of the applicant, and such other information as the commission may request. Upon receipt of such information and on compliance with the regulations and payment of fees, the public service commission shall issue a license to such applicant.

SEC. 9. It shall be unlawful for any public motor carrier to operate as a common carrier of interstate commerce within this state without first having furnished the public service commission in writing full information concerning: (*a*) The ownership, financial condition, equipment to be used and physical property of the applicant; (*b*) the complete route over which the applicant desires to operate; (*c*) the proposed rates, schedule or schedules and/or time cards of the carrier; (*d*) such other information as the commission may request covering observance of state police regulations and payment of fees. Upon receipt of such information and payment of fees the commission shall issue such interstate carrier a license.

SEC. 10. The public service commission shall prescribe forms of applications for certificates and licenses for the use of prospective applicants and shall make regulations for the filing thereof. The commission may designate one of its attorneys to take evidence at the hearing of any application for a certificate or license and submit findings of fact to the commission.

SEC. 11. Where a certificate or license shall have been regularly issued, and thereafter the carrier to whom the same shall have been issued, not being in default in the performance of any of the terms of this act, shall transfer or assign such certificate or license to another qualified hereunder, such certificate or license shall, upon application, be, by the commission, transferred to such assignee upon compliance by the latter with the terms of this act. Subject to any right a holder of any such certificate or license may have to engage in interstate commerce, no license or certificate issued in accordance with the terms of this act shall be construed to be either a franchise or irrevocable.

SEC. 12. No public motor carrier authorized by this act to operate shall discontinue any service established by this act without an order of the public service commission granted only after hearing upon due notice.

SEC. 13. In addition to the regular license fees or taxes imposed upon "public motor carriers of property or of passengers," "contract motor carriers of property or of passengers," and "private motor carriers of property," there shall be assessed against and collected from every such carrier a tax of five-tenths mill per gross ton mile for the administration of this act and for the maintenance, repair and reconstruction of the public highways. The said gross ton mileage shall be computed: (*a*) The maximum seating capacity of each passenger carrying vehicle shall be estimated at 150 pounds per passenger seat; to this sum shall be added the weight of the vehicle, the total shall then be multiplied by the number of miles operated, and the amount thus obtained divided by 2,000; (*b*) 200 per cent of the rated capacity of each property carrying vehicle plus the weight of the vehicle shall be

multiplied by the number of miles the vehicle is operated, and the amount thus obtained divided by 2,000.

SEC. 14. Motor carriers operating under a certificate and having paid their fees for the year 1931 shall receive credit for so much of the fees as have been paid under section 6 of chapter 206 of the Laws of 1925 for the last half of the year 1931.

SEC. 15. Every motor carrier to which this act applies shall keep daily records upon forms prescribed by the commission of all vehicles used during the current month. On or before the 25th day of the month following, they shall certify under oath to the commission, upon forms prescribed therefor, summaries of their daily records which shall show the ton miles traveled during the preceding month, and such other information as the commission may require. The daily records shall be filed and preserved for a period of at least three years, and thereafter until permission for their destruction shall have been given by the commission. Any person who shall willfully under oath make a false return to the commission shall be deemed guilty of perjury.

SEC. 16. The commission is hereby empowered to administer and enforce all provisions of this act, to inspect the books and documents of all carriers to which this act applies, and to expend such amount of the sum collected hereunder as is necessary for such purposes upon requisition by the commission to the state auditor: *Provided, however,* The total sum to be expended as provided in this section shall not exceed during the calendar year twenty per cent of the total gross sum collected under this act. It shall be the duty of the state treasurer to hold in reserve twenty per cent of all moneys collected hereunder during the calendar year for the purpose of meeting such expenditures.

SEC. 17. On or before the 25th day of each month all motor carriers shall pay to the commission on the amount of the fees due from them for the preceding month. If payment is not made on or before said date there shall be added as a penalty a sum equal to one and one-half per cent per month of the amount of the original fee. Said fees and penalties not paid on said date shall constitute a lien upon all the personal property of the delinquent carrier, and also upon the vehicles of all persons leased by it in its business, and thereupon said property and vehicles may be held under warrant issued by the commission and may be sold in accordance with the law applicable to personal property taxes. In addition thereto, such delinquency shall be a ground for the issuance of writ of attachment by any court of record against the carrier, and for the suspension or revocation by the commission of the certificate or license; said suspension or revocation may be ordered after a hearing by the commission held after a notice of not less than five days to all parties interested. The commission shall enforce collection of all fees and penalties provided in this act, and daily remit to the state treasurer the proceeds thereof.

SEC. 18. All moneys received under the provisions of this act shall be distributed: (*a*) For administration and enforcement of the provisions of this act, twenty per cent shall be held by the state treasurer for the use of the public service commission; (*b*) the balance the said treasurer shall place to the credit of the highway fund of the state and it shall become a part thereof.

SEC. 19. Any person who shall operate as any carrier to which this act applies without first obtaining a certificate or license or in violation of any of the terms thereof, or who fails to make any return or report required by this act or by the commission hereunder, or who

denies to the commission access to his books or records, shall be guilty of a misdemeanor and shall be punished as hereinafter provided.

SEC. 20. The commission is empowered to expend such money as may be necessary for the administration and enforcement of this act, but said sum shall not exceed the twenty per cent allowed to the commission in subparagraph (*a*) of section 18 hereof.

SEC. 21. No certificate or license shall be issued by the public service commission to any "public motor carrier of property," "public motor carrier of passengers," "contract motor carrier of property or passengers" or "private motor carrier of property," until and after such applicant shall have filed with, and the same has been approved by, the public service commission, a liability insurance policy in some insurance company or association authorized to transact business in this state, in such reasonable sum as the commission may deem necessary to adequately protect the interests of the public with due regard to the number of persons and amount of property involved, which liability insurance shall bind the obligors thereunder to pay compensation for injuries to persons and loss of or damage to property resulting from the negligent operation of such carrier. No other or additional bonds or licenses than those prescribed in this act shall be required of any motor carrier by any city or town or other agency of the state.

SEC. 22. The commission shall promulgate and publish in the official state paper, and mail to each holder of a certificate or license hereunder, such regulations as it may deem necessary to properly carry out the provisions and purposes of this act. The commission may at any time, for good cause, suspend, and, upon at least five days' notice to the grantee of any certificate and an op-

portunity to be heard, revoke or amend any certificate. Upon the commission finding that any public carrier does not give convenient, efficient and sufficient service as ordered, such public carrier shall be given a reasonable time to provide such service before any existing certificate is revoked or a new certificate granted. Any rules promulgated by the commission shall include: (*a*) Every vehicle unit shall be maintained in a safe and sanitary condition at all times. (*b*) Every operator of a motor vehicle used as a public carrier shall be at least twenty-one years of age; and every operator of other carriers to which this act applies shall be at least sixteen years of age; and all such operators shall be of good moral character and fully competent to operate the motor vehicle under his charge. (*c*) Hours of service for operators of all motor carriers to which this act applies shall be fixed by the commission. (*d*) Accidents arising from or in connection with the operation of carriers shall be reported to the commission in such detail and in such manner as the commission may require: *Provided*, That the failure to report any such accident within five days after the happening thereof shall be deemed willful refusal to obey and comply with a rule of the commission. (*e*) The commission shall require and every carrier shall have attached to each unit or vehicle such distinctive marking as shall be adopted by the commission.

SEC. 23. Every carrier to which this act applies and every person who violates or who procures, aids or abets in the violating of any provision of this act, or who fails to obey any order, decision or regulation of the commission, or who procures or aids or abets any person in his failure to obey such order, decision or regulation, shall be deemed guilty of a misdemeanor and upon conviction shall be punished by a fine of not exceeding

$500. The inspectors designated by the commission shall have all the lawful powers of peace officers to enforce this act in any county or city of this state.

SEC. 24. It shall be the duty of the county attorneys to prosecute all violations of this act.

SEC. 25. Certificates issued to public carriers by the commission under the authority of chapter 206 of the Laws of 1925 shall remain in effect hereunder.

SEC. 26. All parts of chapter 206 of the Laws of 1925 and chapter 222 of the Laws of 1929 (being sections 66-196 to 66-1,107, inclusive, of the 1930 Supplement to the Revised Statutes of Kansas, 1923), inconsistent or in conflict with this act are hereby repealed.

SEC. 27. This act shall take effect and be in force from and after July 1, 1931, and publication in the statute book.

Approved March 16, 1931.

Published May 28, 1931.

FILE COPY

APR 20 1932
CHARLES ELMORE CROPLEY
CLERK

THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931.

No. 677.

CONTINENTAL BAKING COMPANY, a corporation; GENERAL BAKING COMPANY, a corporation; SCHULZE BAKING COMPANY, a corporation, and CARL WILKE, doing business as the WILKE BAKING COMPANY, APPELLANTS,

vs.

HARRY H. WOODRING, as Governor of the State of Kansas; ROLAND BOYNTON, as Attorney General of the State of Kansas; JESSE W. GREENLEAF, THURMAN HILL and CHARLES W. CAMPBELL, as members of the Public Service Commission of the State of Kansas, APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

BRIEF OF APPELLEES.

ROLAND BOYNTON,
WALTER T. GRIFFIN,
CHARLES W. STEIGER, and
EARL H. HATCHER,
Solicitors for Appellees.

KELLEY BRIEF PTG. CO. TOPEKA

INDEX.

	Page
OPINION OF COURT BELOW	1-2
STATEMENT	2-4
SUMMARY OF ARGUMENT	4-12
ARGUMENT	12-50
In General	12
Smith v. Cahoon Distinguished	15
Admissions of bill of complaint and presumption of validity	19
The exemption of motor carriers who operate wholly within a city or village	20-25
The exemption of private motor carriers who operated within a radius of 25 miles beyond the corporate limits of such city or village	25-33
The exemption of "Transportation of livestock and farm products to market by the owner thereof or supplies for his own use in his own motor vehicle	33-40
The exemption of transportation of children to and from school	40-42
Do Sections 2, 17, 19, 23 and 24 impose obligations upon appellants to which the State had no constitutional authority to subject them, or fail to define such obligations with a fair degree of certainty	42-44
Powers given public service commission by Sections 5, 8, 16, 19, 22 and 23	44-50
The provisions of Section 21 requiring a liability insurance policy conditioned to pay compensation to injured persons or damage to property resulting from negligent operations	50-51
CONCLUSION	51

TABLE OF CASES AND AUTHORITIES CITED.

Federal Decisions.

	Page
Alward v. Johnson, 282 U. S. 509	35
Carley & Hamilton v. Snook, 281 U. S. 66, 72, 73; 50 S. Ct. 204	30
Chicago R. I. & P. Ry. Co. v. U. S. 76 L. ed. 93	8, 30
Hall v. Geiger-Jones Co. 242 U. S. 539	14, 24, 32, 40
Iowa Motor Veh. Ass'n v. Board of R. R. Comm., 207 Iowa 461, Affirmed, 280 U. S. 529	9, 38
Louis v. Boynton, 58 Fed. 2d. 47	4, 7, 10
Munn v. Illinois, 94 U. S. 113	6, 19
Patsone v. Penn, 232 U. S. 138	8, 24, 32, 40
Plymouth Coal Co. v. Penn. 232 U. S. 531	47
Silver v. Silver, 280 U. S. 117	9, 32
Smith v. Cahoon, 283 U. S. 553	5, 15, 49
St. Louis I. M. & S. Ry. Co. v. Arkansas, 240 U. S. 518	14, 25
Stephenson v. Binford, 53 Fed. (2d) 509	15
United States v. Ryan, 76 L. ed. 71	11, 47

State Court Decisions.

Clark v. Maxwell, 197 N. C. 694	8, 28-30
Davis v. Mayor etc. of Macon, 64 Ga. 128	36
Iowa Motor Vehicle Assn. v. Bd. of R. R. Commrs., 207 Ia. 461	9, 38
Re: Opinion of Justices, 81 N. H. 566	11, 50
Smallwood v. Jeter, 42 Idaho 169, 244	42
Southern Transfer Co. v. Harrison, 171 Ga. 358	26, 38
State v. LeFebvre, 174 Minn. 248	9, 10, 39, 42
State v. Kozer, 116 Ore. 581	7, 8, 9, 22, 27, 36
State v. Zimmerman, 181 Wis. 552	40

Digest and Text Books.

12 Corpus Juris 1152	33
42 Corpus Juris 710	11, 50
26 R. C. L. 297	22

The Supreme Court of the United States

OCTOBER TERM, 1931.

No. 677.

CONTINENTAL BAKING COMPANY, a corporation; GENERAL BAKING COMPANY, a corporation; SCHULZE BAKING COMPANY, a corporation, and CARL WILKE, doing business as the WILKE BAKING COMPANY, APPELLANTS,

vs.

HARRY H. WOODRING, as Governor of the State of Kansas; ROLAND BOYNTON, as Attorney General of the State of Kansas; JESSE W. GREENLEAF, THURMAN HILL and CHARLES W. CAMPBELL, as members of the Public Service Commission of the State of Kansas, APPELLEES.

BRIEF OF APPELLEES.

I.

OPINION OF COURT BELOW.

The opinion of the statutory three-judge Federal Court for the District of Kansas, First Division, appears as Continental Baking Co. et al., v. Woodring, Governor

of Kansas, et al., in 55 Fed. (2d) 345, and the opinion is in the printed record of this case beginning at page 26. The decree is found at page 46 of this record.

II.

STATEMENT.

This appeal is from an order and decree (R. 46) of a statutory three-judge court for the District of Kansas, consisting of George T. McDermott, C. J., Franklin E. Kennamer, D. J., and Richard J. Hopkins, D. J.

The decree denied the application of appellants for temporary injunction and dismissed the cause. The matter was submitted upon the issues joined by the bill of complaint (R. 1) and the motion to dismiss the bill of complaint. (R. 21)

The appellants by their bill of complaint pray that the appellees be enjoined from enforcing Chapter 236 of the Laws of Kansas for 1931.

Chapter 236 of the Laws of 1931, places a special tax, based on truck capacity and mileage, upon carriers which carry for hire and upon those engaged in transportation by motor vehicle of property sold in furtherance of any commercial enterprise. (R. 11.) Such taxes must be used for maintenance, repair and construction of public highways, and the administration of the act. The act requires public carriers to secure a certificate of convenience before doing intrastate business; it requires all carriers to procure a license and to carry liability insurance; it authorizes the Public Service Commission

to promulgate rules and regulations looking to the safe operation of the vehicles of all carriers.

Section 1 of Chapter 236 of the Laws of 1931, classifies motor carriers as "public motor carriers of property", "contract motor carriers of property", "private motor carriers of property", "public motor carriers of passengers" and "contract motor carriers of passengers". (R. 11 and 12).

The three classifications of motor carriers pertaining to carriers of property are defined as follows:

> "The term 'public motor carrier of property' when used in this act shall mean any person engaged in the transportation by motor vehicle of property for hire as a common carrier having a fixed termini or route."
>
> "The term 'contract motor carrier of property' when used in this act shall be construed to mean any person not a public motor carrier of property engaged in the transportation by motor vehicle of property for hire as a business."
>
> "The term 'private motor carrier of property' when used in this act shall be construed to mean any person engaged in the transportation by motor vehicle of property sold or to be sold by him in furtherance of any private commercial enterprise."

That the appellants fall within the classification of "private motor carriers of property" is not disputed. All of the appellants are engaged in the manufacture of bread and other bakery products in plants owned by them. Some are located within and some without the State of Kansas, and such bakery products are delivered in the State of Kansas by the appellants in their

own trucks from plants located within and outside the state.

The appellees' motion to dismiss the bill of complaint was heard on October 10, 1931; on the 6th day of January, 1932, the court entered a decree dismissing the bill of complaint, dissolving the temporary restraining order theretofore issued and denying the appellants the relief prayed for.

Previously a similar attack was made upon the same statute by a "contract carrier for hire" and the statute was held to be good as against that attack by the District Court of Kansas, Judges Phillips, Symes and Hopkins sitting (Louis v. Boynton, 53 Fed. (2d) 473).

III.

SUMMARY OF ARGUMENT.

In General.

Chapter 236, Kansas Laws of 1931, is the result of the legislature's endeavor to protect the state's investment in its highway system, to safeguard the persons and property of all classes of users of the highways, and to secure compensation from those commercial users receiving greatest benefit from such highway system.

In making provisions to effect these purposes, the legislature gave consideration to its knowledge of traffic upon the highways and the extent of use of and benefits derived from highways by different classes of carriers, and also to provisions which would be practical in operation and administration.

The legislature attempted to produce a comprehensive bill, which carefully distinguished private carriers, contract carriers for hire, and common carriers. The statute clearly defines three general plans: One for the control of common carriers, one for the control of contract carriers for hire, and the other for the control of private carriers.

If the exceptions and exemptions are tested by their general application to the classes affected, and not by such hypothetical cases as are suggested by counsel for appellants, practical equality will result.

Smith v. Cahoon Distinguished

The appellants rely principally on Smith v. Cahoon, 283 U. S. 553. We do not believe that this case is controlling as to the constitutionality of the statute. The Cahoon case was an appeal from the Supreme Court of Florida, which had denied a writ of habeas corpus to the appellant. The Florida statute undertook to exempt such carriers for hire as were engaged in the transportation of agricultural, horticultural and piscatorial products, thus attempting to distinguish between public carriers who were engaged in transportation for hire and who were all habitual and continuous users of the highways, on account of the nature of the product carried. The appellant had been arrested for operating a truck without a license and on appeal the law was held unconstitutional on the ground that to distinguish between two public carriers for hire because of mere difference in class of product carried was unconstitutional. The

statute also contained provisions which could only be applicable to common carriers and others which could be applicable to all carriers, but these provisions were hopelessly intermingled. The statute had not been construed when the appellant was arrested and the question was whether or not the appellant could be restrained of his liberty for violating the statute, when its terms were obscure and had not yet been construed. The Supreme Court released the defendant with the statement that, "It should be observed that this is not an action in equity where the enforcement of the statute awaits the final determination of the court." The present case is such an action. The provisions of the Kansas statute are not hopelessly intermingled as the Florida statute. The statute has been construed and nobody is deprived of his liberty. For these reasons we do not believe that the Cahoon case controls this case.

1. Admission of bill of complaint and presumption of validity.

The truth of all well pleaded allegations of appellants' bill of complaint is admitted by the appellees' motion to dismiss, and the cause is submitted to this court on such allegations and matters of judicial notice.

The burden is upon the appellants to overcome the presumption of validity of the statute. (Munn v. Illinois, 94 U. S. 113.)

2. The exemption of motor carriers who operate wholly within a city or village.

The exemption of motor carriers who operate wholly within a city or village from the tax is justified because the tax does not go to the construction or maintenance of city or village streets generally, and because such streets are kept up and maintained by local taxation to which such exempted carriers contribute.

In connection with this exemption the act imposes the tax upon those carriers who use the rural highway system to which the tax revenues go, and exempts those carriers who do not secure direct benefit from such rural highway system. (Louis v. Boynton, 53 Fed. (2d) 473; State v. Kozer, 116 Ore. 581.)

The exemption from the liability insurance and regulatory requirements of motor carriers who operate wholly within a city is justified because such carriers are subject to regulatory municipal ordinances. The operations of carriers who do business wholly within a village are so circumscribed as not to require such regulation.

3. The exemption of private carriers who operate within a radius of twenty-five miles beyond the corporate limits of a city or village.

This provision gives to all private carriers an area with a radius of twenty-five miles beyond the corporate limits of their city or base, which is free from the tax and insurance and regulatory provisions. As to this area, all private carriers are treated alike.

The exemption is justified because of the impracticability, from an administrative standpoint, of attempting to tax and regulate the myriad of small local operators. The scope of operations is a proper basis of classification. (Chicago R. I. & P. R. Co. v. United States, 76 L. Ed. 93.) The privilege of engaging in business over a wide area is more valuable than that of engaging in business over a small area. (Clark v. Maxwell, 197 N. C. 694, affirmed—Clark v. Maxwell, 282 U. S. 811; State v. Kozer, 116 Ore. 581.) Those whose operations are limited to the twenty-five mile radius are subject to local taxation for the upkeep of the roads used by them, but this is not the situation as to operators hauling over long distances.

Private carriers doing business in the local twenty-five mile area, commonly use the less travelled county and township roads, while the through carriers in general use the improved state highway system, upon which the denser traffic and the higher speed cause greater danger of injury. This condition justifies the liability insurance and regulatory measures where the risk and need are greatest. (Patsone v. Pennsylvania, 232 U. S. 138.)

4. The exemption of transportation of livestock and farm products to market by the owner, or supplies for his own use in his own motor vehicle.

The transportation of farm products and livestock so far as carried on by the owner thereof, is distinguished from the transportation operations of other private car-

riers by its seasonal and incidental nature. Commercial enterprises, whether mercantile, factory, or mine, usually have a practically continuous output and the transportation of such products occasions a rather regular and persistent use of the highways. In this respect the transportation of livestock and farm products to market by the individual owner (usually the producer) is clearly distinguished. It is carried on over short distances, and commonly over the lesser used county and township roads, and covers a small number of days in each year.

To require a liability insurance policy and enforce regulatory provisions as to each of the vast number of such minor carriers would be a work of great administrative difficulty, and out of proportion to the results that could be accomplished. (State v. LeFebvre, 174 Minn. 248; State v. Kozer, 116 Ore. 581; Iowa Motor Vehicle Association v. Board of Railroad Commissioners, 207 Iowa 461, affirmed by the United States Supreme Court under same title, 280 U. S. 529.)

A regulation, in other respects permissible, is not unconstitutional as denying equal protection of the laws because it does not reach every class to which it might be applied, where it strikes at the evil where it is felt. (Silver v. Silver, 280 U. S. 117.)

5. Exemption of the transportation of children to and from school.

The transportation of children to and from school by motor carriers is a public service and conducted at public expense for public welfare. The state has a

right to exempt such transportation from the tax provisions of the act.

The school authorities have control of the transportation of pupils, and may properly be depended upon to make proper provisions for safe operation on the highways. (Louis v. Boynton, 53 Fed. (2d) 473; Minnesota v. LeFebvre, 174 Minn. 248.)

6. Do Sections 2, 17, 19, 23 and 24 impose obligations upon appellants to which the state had no constitutional authority to subject them, or fail to define such obligations with a fair degree of certainty?

Under this heading in the brief proper we take up and discuss the several sections referred to, and arrive at what we believe to be a reasonable construction without any great difficulty.

Appellants' statement that if they fail to correctly construe any of the above provisions of the act, they are subject to arrest and prosecution, appears to be unwarranted. Upon their own statements, they are all private carriers who operate beyond the limits of any city or village and beyond the exempted twenty-five mile radius. They are, therefore, required to apply for and secure licenses and to pay taxes. Having taken out the licenses, they are at liberty to use any of the highways in Kansas and are not subject to prosecution therefor. In case of a bona fide error in the computation of the amount of tax due from them, it is not to be assumed that they will be prosecuted without opportunity to secure a construction of the law. In fact, the court below has already given a construction.

7. Powers given the Public Service Commission by Sections 5, 8, 16, 17, 19, 22 and 23.

Appellants' chief objection under this subdivision is that the last sentence in Section 5 makes private motor carriers subject to the same duties and liabilities as common carriers. Under a reasonable and logical construction of the section, the laws relating to the powers and duties and jurisdiction of the Public Service Commission over common carriers are made applicable to common motor carriers only. Even if a literal construction of the statute would bring the absurd and unconstitutional result claimed by counsel for the appellants, it should be avoided, because a construction which is reasonable and in accord with the legislature's purpose can be found. (United States v. Ryan, 76 L. ed. 71.)

8. The provisions of Section 21 requiring a liability insurance policy conditioned to pay compensation to injured persons or damage to property resulting from negligent operations.

This provision is properly construed to apply only to indemnification of other users of the highways for injuries caused by negligent operation of the licensed carriers. It does not require contract or private carriers to carry insurance covering damages to their passengers or cargo. Appellants being carriers of their own goods only, clearly would not be subject to such requirement; and so construed, it is valid. (42 C. J. 710; Re Opinion of Justices, 81 N. H. 566.)

IV.

ARGUMENT.

In General.

Faced with the necessity of protecting the highways of Kansas and the people on them from the dangers of unrestrained commercial vehicle operations, and of securing to the people of the state a safe and dependable system for the transportation of freight and passengers on the highways, the legislature enacted the statute now under discussion.

The State of Kansas has at a great expense constructed a system of improved highways. These highways have been built and maintained at great expense. The burden has been borne in part by special benefit districts, in part by tax on gasoline sold in the state, and in part by license fees exacted from all resident owners of automobiles. These improved highways have now become the road beds of transportation companies which are actively and seriously competing with railroads which provide their own road beds. The free use of highway systems for transportation purposes is having a far reaching effect upon established common carrier transportation service by rail.

The improved highway systems are being used by concerns such as plaintiffs for the daily delivery of their products to every city and village in the state.

Commercial motor carriers are already using main highways of the state system to such an extent as to jeopardize the safety of those using private passenger

automobiles thereon, and deter and interfere with their lawful use. The situation becomes worse with the passage of time, due to the increasing number of commercial vehicles, and the faulty manner in which many of them are equipped and operated.

The highways of the state are being destroyed by these trucks, which combining weight and speed, make the maintenance of the highways an increased burden to the state.

The purposes which the legislature had in mind in the passage of the present law were to require those who daily use the highways for commercial purposes to pay an additional tax for their maintenance and upkeep, and to provide such regulation as was necessary for the safety of others.

As stated in the opinion of the court below, "the amount of charges and the method of collection are for the state to determine so long as they are reasonable and conform to some fair and practical standard." (R. 28.)

The legislature in drafting the statute attempted to produce a comprehensive bill which carefully distinguishes between private and common carriers. The statute clearly discloses two general plans, one for the control of public carriers and the other for the control of private carriers. When the law is construed as applicable to the general classes affected, practical equality results. The validity of the law is to be determined with respect to the practical problems confronting the legislature and not in the light of theoretical or imag-

inary discriminations which may be advanced. This matter was well covered in the opinion of the court below in which it said:

> "As in the case of most legislation which is the subject of wide interest and which is amended on the floor and in conference, many questions of construction are raised. Counsel for the plaintiffs make many suggestions which would improve the draftsmanship of the bill, as doubtless they will be able to do as to any bill that may be later enacted. We are not aided in our efforts to construe the law by the hypothetical absurdities which are suggested by counsel and which have come to be the conventional method of presenting constitutional questions, for, as was said by the Supreme Court of Oregon in State v. Kozer, 116 Ore. 581, 242 Pac. 620, the constitutionality of a statute cannot be tested by isolated cases conjured by fertile imagination; it must be tested by 'its general application to the classes affected, and not to certain individuals belonging to such classes. Exact equality is not possible. Practical equality is constitutional equality. The human mind has not yet been able to devise any scheme of taxation which will operate with unerring certainty and equality to all situations which may arise." Southwestern Oil Co. v. Texas, 217 U. S. 114; Bell's Gap R'd Co. v. Penn., 134 U. S. 232. (R. 28-29.)

For an act of this nature to be valid, the legislature is not required to have covered the whole field of abuses, within the rule laid down in Hall v. Geiger-Jones Co., 242 U. S. 539, and St. Louis, I. M. & S. Ry. Co. v. Arkansas, 240 U. S. 518, quoted from hereinafter at pages 24 and 25.

Smith vs. Cahoon Distinguished.

The appellants in their brief cite a number of cases laying down fundamental principles of constitutional law with which appellees have no argument. We do not believe, however, that the principles as pronounced in those decisions are in any way violated by the provisions of the act now in question.

The appellants place much emphasis upon the case of Smith v. Cahoon, 283 U. S. 552. This case is cited as authority for the appellants' contentions some twenty-seven times in their brief. It appears, therefore, as stated by the court in the case of Stephenson v. Binford, 53 Fed. (2d) 509, that the carriers have again in their efforts to avoid paying for the use of the highways, and to prevent regulation by the state, taken as their shibboleths, the pronouncements of the Supreme Court in the case of Smith v. Cahoon.

The appellees do not believe that it was the intention of the Supreme Court in that case to lay down a rule which would prevent the states, under a properly constructed statute, placing upon those using the highways for commercial purposes, such regulations as were necessary for the protection of the general public, and collecting from such transport haulers a reasonable fee for the use of the improved roads. The Smith v. Cahoon case is recognized in the opinion of the court below and carefully distinguished on what we believe to be a sound basis. In its opinion, the court below said:

> "The plaintiffs rely principally upon Smith v. Cahoon, supra. That was an appeal from the Su-

preme Court of Florida, which had denied a writ of habeas corpus to the appellant. The appellant had been arrested for operating a truck without a license. The statute undertook to exempt such public carriers as were engaged in the transportation of agricultural, horticultural and piscatorial products. To thus distinguish between two public carriers, each of which is engaged in transportation for hire, and each of which was a habitual and continual user of the highway, on account of the nature of the product carried, was held to be unconstitutional. Moreover, the statute contained provisions which could legally be applicable only to common carriers, and other provisions which could be applicable to all carriers, but these provisions were intermingled. When the appellant was arrested, the statute had not been construed. The question to be determined was whether or not the appellant could be restrained of his liberty for violating the statute, the terms of which were obscure, and which had not been construed by the courts. He was released. But the Supreme Court stated, 'It should be observed that this is not an action in equity where the enforcement of the statute awaits the final determination of the court as to validity and scope.' The present case is such an action. The Supreme Court further said that, 'until such separation has been accomplished by judicial decision,' the statute remained uncertain. But the provisions of the Kansas statute are not so hopelessly intermingled as the Florida statute; and in the second place, the statute has now been construed and nobody is deprived of his liberty. We do not believe that the Cahoon case controls this case." (R. 44.)

The Kansas act carefully distinguishes and classifies common carriers, contract carriers for hire, and private carriers engaged in the transportation by motor vehicles

of property sold in furtherance of any commercial enterprise. There is no attempt in the statute to make common carriers out of contract carriers for hire, or private carriers.

The Florida act applied only to those persons operating motor vehicles "used in the business of transporting persons or property *for compensation,* or as a common carrier," and expressly eliminated from its provisions "any transportation company engaged exclusively in transporting agricultural, horticultural, dairy or other farm products and fresh and salt fish and oysters and shrimp from the point of production to the assembling or shipping point en route to the primary market *** " It is therefore clear that the Florida act did not at all relate to those persons who were engaged in transporting their own goods over the highways, and that the attempted exemption was of carriers for hire (or contract carriers) of certain classes of goods, namely, agricultural and sea food products, while not permitting the same privilege to like carriers for hire of other classes of goods.

The exemption of the Kansas act under consideration, so far as it applies to agricultural products, is limited to "the transportation of livestock and farm products to market *by the owner thereof,* or supplies for his own use *in his own motor vehicle;* *** " Under this act only the actual owner of farm products is exempted.

Considering first the provisions of the Florida act, it is our view that a carrier *for hire* of agricultural products or sea foods will be engaged in that business as a

regular industry and will so arrange his trucking activities as to secure the largest volume of business and the greatest income; that is, he makes his place of business on the public highway and makes himself substantially a regular and continuous user of the highways, practically as much so as a common carrier or a carrier for hire of any other goods. Appellees concede that the carrier *for hire* of agricultural products will use the highways to substantially the same extent as the carrier for hire of other raw materials or manufactured articles, and think that the Supreme Court's decision was the only one justified by the facts as to the attempted classification.

Now considering the Kansas agricultural exemption, which is limited to transportation by the owner of produce to market, we see a substantially different situation as relates to the extent of use of the highways by the carrier. The producer of farm products is engaged primarily and for the greater bulk of his time upon his own lands and only incidentally and occasionally uses the public highways for the marketing of the comparatively few crops that he will raise during the year. His use of the highways is insignificant as compared with the use by other carriers of their own goods. A mercantile organization distributing its own goods will use the highways daily and continuously; likewise a manufacturer or a mine operator has a continuous output, and the use by them of the highways in distributing goods will be practically continuous.

For these reasons, it is appellees' view that the lack

of a reasonable basis for the exceptions that obtained in the Florida case does not exist as respects the Kansas act now considered. Appellees think the views taken by state supreme courts hereinafter referred to, to the effect that the use of the highways in marketing agricultural products by the owner is a minor use, justifying a separate classification, are well taken, and are not in conflict with the United States Supreme Court decision in the Cahoon case.

1. Admissions of bill of complaint and presumption of validity.

Appellees agree with appellants' statement that the motion to dismiss admits the truth of all well pleaded allegations of the bill of complaint. The cause is before this court upon the allegations of the bill and the facts of which the court takes judicial notice. Some of these facts are referred to in the opinion of the court below.

It is also true that the presumption is in favor of the validity of the statute, and the burden is upon the appellants to overcome this presumption.

The rule is well stated in the case of Munn v. Illinois, 94 U. S. 113, in which Chief Justice Waite, speaking for the court, said:

> "Every statute is presumed to be constitutional. The court ought not to declare one unconstitutional unless it is clearly so. If there is doubt, the express will of the legislature should be sustained." (p. 123.)

2. The exemption of motor carriers who operate wholly within a city or village.

The appellants complain that under the Kansas act being considered no tax is imposed on trucks operated wholly within a particular city or village, while they must pay the tax upon all mileage operated by their trucks within the same city.

The exemption from the payment of tax within a city or village applies only to the base city or village within which the truck operates, and does not exempt any carrier from the tax while operating within any other city or village. Appellants could operate wholly within a particular city or village if they desired, or they could allocate certain trucks to a certain city or village, and thereby secure exemption under this clause. It appears however from their allegations that they choose to have their several trucks do both city and country transportation. By so doing they secure for each truck a more extensive use of the highways and put their operations in a different class from those of carriers who operate entirely within any city or village.

The justification for the tax is compensation for the use of the highway. After deduction of what is required for the administration of the act, all the rest of the tax goes to the construction, repair and maintenance of the state highway system, including those individual city streets which have been designated as a part of the system, and county and township roads. No portion of the tax is used for city and village streets generally which are not portions of the state highway system.

It appears clear that operators engaged as are the appellants in the distribution of their products as manufacturers, will in general when passing through a city or village, use the connecting highways and connecting streets which are part of the state highways, and have the benefit of the portion of the tax that is expended on city streets. On the other hand, those operating wholly within any city or village, and consequently exempt from provisions of this act, will use the various streets and alleys indifferently in the conduct of their businesses, and receive little direct benefit from this tax.

Furthermore, the local carriers who confine their operations exclusively within one city or village will, as a rule, be subject to general property taxes, automobile license fees, motor vehicle fuel taxes and possibly municipal license fees, part or all of which are devoted to local street construction and maintenance.

In consequence there is no requirement of justice or fairness that those carriers who are now exempted because of operating wholly within a city or village, and who are subject to property and city license taxation for maintenance of the city streets, should be specially taxed for the upkeep of the general highway system which they do not use.

Because of these circumstances, we feel that the legislature had a just and reasonable basis for exempting those carriers who use only streets of a particular city or village.

The appellants' chief objection to the city exemption seems to be that they are not located in a city within

the state so as to be entitled to the exemption. The statute has no extra-territorial force and does not reach them in the city in which they have their base, so there is no occasion for the exemption as to them. Their objection on this ground would appear to be unfounded.

The views expressed above were followed by the court in the case of Louis v. Boynton, et al., 53 Fed. (2d) 473, in which the court said:

> "Eighty percent or more of the tax is to be used to create a fund for reconstruction of highways. Such fund will be entirely expended outside of the corporate limits of cities and villages. It is obvious, therefore, that motor carriers operating wholly within a city or village will not receive any direct benefit therefrom, and just reason exists for exempting them from the tax."

In State v. Kozer, 116 Ore. 581, the Oregon court held that it was proper to measure the amount of the tax by the extent of the use of the highways, and to exact higher fees of owners who are given the privilege of operating their vehicles over a greater extent of highways.

> "The power to prescribe what property shall be taxed implies the power to prescribe what property shall be exempt; and, in the absence of a special constitutional provision to the contrary, the legislature may exempt such classes of property from taxation as, in its opinion, the public policy of the state requires." (26 R. C. L. 297.)

This tax being an excise rather than a general prop-

erty tax, it is not subject to the constitutional provision requiring uniform and equal assessment.

Appellants next object to the exemption on the ground that carriers operating wholly within a city or village are not subject to the regulatory, public safety and indemnity features of the act, while appellants are subject to these features if they operate into and thru such city or village. We find a substantial basis for this distinction. The cities are empowered by state law to enact and enforce regulations to meet their various needs and to protect the interest of the public. It is presumed that they will do so as to such carriers as operate exclusively within their limits, and for this reason are not within the regulatory provisions of the act.

Where carriers operate wholly within a city and are not within the provisions of this act, we believe it is clear that a city may provide its own safety measures and it is not prohibited from so doing by the provision in Section 21 of the Act that "no other or additional bonds or licenses than those prescribed in this act shall be required of any motor carrier by any city, town, or other agency." This provision applies only to carriers who are required to have license under the provisions of the act.

This provision is for the benefit of carriers engaged as are appellants. Except for it, they might be obliged to comply with both local city regulations and the provisions of the state act.

In addition to the justifiable reasons which we think the legislature had for exempting operators wholly

within a city, or within a radius of twenty-five miles beyond, from the regulatory provisions, we believe that a state may direct its laws against what it deems an evil as it actually exists, without covering the whole field of possible abuses.

This principle has been enunciated by this court in numerous cases. In Patsone v. Pennsylvania, 232 U. S. 138, Justice Holmes stated:

> "We start with the general consideration that a state may classify with reference to the evil to be prevented, and that if the class discriminated against is or reasonably might be considered to define those from whom the evil mainly is to be feared, it properly may be picked out. A lack of abstract symmetry does not matter. The question is a practical one, dependent upon experience. The demand for symmetry ignores the specific difference that experience is supposed to have shown to mark the class. It is not enough to invalidate the law that others may do the same thing and go unpunished, if, as a matter of fact, it is found that the danger is characteristic of the class named. Lindlsey v. National Carbonic Gas Co., 220 U. S. 61, 80, 81, 55 L. ed. 369, 378, 379, 31 Sup. Ct. Rep. 337, Ann. Cas. 1912 C. 160. The state 'may direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses.'"

In later cases, the Court has said:

> "A state may direct its law against what it deems the evil as it actually exists, without covering the whole field of possible abuses, and it may do so none the less that the forbidden act does not differ in kind from those that are allowed." Hall v. Geiger-Jones Co., 242 U. S. 539.

"We have recognized the impossibility of legislation being all comprehensive, and that there may be practical groupings of objects which will as a whole fairly present a class of itself, although there may be exceptions in which the evil aimed at is deemed not so flagrant." St. Louis, I. M. & S. R. Co. v. Arkansas, 240 U. S. 518.

3. The exemption of private motor carriers who operate within a radius of 25 miles beyond the corporate limits of such city or village.

Careful consideration should be given this exemption to determine whether or not a new class is created by it or whether it simply creates an exempt area for all persons operating in the class of private carriers. In the administration of the act the Public Service Commission has construed this exemption as an exemption or exception granted to all private carriers and not as creating a new class. So long as private carriers operate within a radius of 25 miles of their home city or base they are not subject to the payment of the fee. Even though they have made trips outside the 25 mile radius, which subjects them to the law and to the payment of tax for such trips, they are still not subject to the payment of a tax for trips made entirely within the 25-mile zone. Under this construction all private carriers are placed upon an equal footing. So long as they operate within a radius of 25 miles, no private carriers are subject to the tax. When any trip is made beyond the 25-mile limit, all private carriers are subjected to the payment of the tax on such trip. This construction

eliminates all discrimination, as all private carriers are treated alike, both within and without the 25-mile zone.

It is a matter of judicial notice that this exemption was not in the bill as presented to the legislature by the highway committee, but was written in on the floor of the house. It must be presumed that the legislature had in mind good reasons for the change, including the fact that operations within a radius of 25 miles are not chiefly on improved highways, but are largely upon township and county roads. We also call to the attention of the court that a large part of the improved highway system has been built under the benefit-district plan and that a great many of the users of the highways wholly within the 25-mile radius have been heretofore called upon to pay a large amount for the construction and maintenance of those highways, and that they have heretofore paid more than their proportionate share for the use thereof. The legislature must have also had in mind that persons operating within 25 miles of their home base, contributed heavily through property taxes, for the maintenance and upkeep of the highways within that limit.

It is elementary law that in construction of a tax statute the court will take into consideration the conditions, benefits and protections which the legislature had in mind when the act was passed, and look into the motive which actuated the legislature when the exemption was made.

> "The legislature can make any classification or subclassification which is reasonable and not arbi-

trary. It is within the power of the general assembly to make one general class of persons engaged in a particular business, for the purpose of taxing their occupation; and it may constitutionally make for this purpose a more limited class composed of persons engaged in the same occupation in a particular way. The fact of the exemption of certain persons from the operation of the tax imposed upon a class does not destroy the uniformity required by the above provision of the constitution, provided the exemption is not arbitrary and is based upon some good reason." (Southern Transfer Co. v. Harrison, 171 Ga. 358.)

In the case of State ex rel. v. Kozer, 116 Ore. 581, the court considered and upheld the kind of classification involved here—in that case an area within five miles beyond the limits of cities or towns. The Oregon statute, there considered, imposed an additional license fee upon all motor vehicles, exclusive of common carriers, which were used for commercial purposes in selling and delivering goods outside incorporated cities or towns and in excess of five miles beyond the boundaries of such cities or towns. The court held this exemption not invalid as for arbitrary classification. The propriety of the additional fee was predicated upon the greater use of the highways secured by those subject to the additional tax. The Oregon court, in its opinion, quoted Mr. Justice McKenna of this court in Mutual Loan Company v. Martell, 222 U. S. 225, as follows:

"We have declared so often the wide range of discretion which the legislature possesses in classifying the objects of its legislation that we may be excused from a citation of the cases. We shall only

repeat that the classification need not be scientific nor logically appropriate, and if not palpably arbitrary and is uniform within the class, it is within such discretion."

The Oregon court further said in the opinion:

"In determining whether the classifications in question are reasonable, it is important to give due consideration to the general purpose and spirit of the Oregon motor vehicle laws. It is apparent, even from a casual reading of the same, that the legislature intended to impose upon those who most use the public highways of this state the greatest part of the burden of repairing and maintaining them. This policy, as a matter of abstract justice, is unquestionably sound. It requires the person who causes the most wear and tear on our highways, which are maintained at great expense, to assume a just part of this public burden." (Page 588.)

At pages 29 and 32 of their brief, appellants contend that any exemption, based on area or distance between termini, would be arbitrary and void; and on page 30, they state that if it was the intention of the legislature to exempt the small user on the basis of the cost of administration, then the only method justified would be to exempt so many miles of operation. But would such an exemption be practicable? What means would the State have of determining the total mileage of each carrier in the event that he failed to disclose the information? We think that the classification, based upon area covered, adopted by the legislature, was a reasonable and practical one. Appellants say that in the case of Clark v. Maxwell, 197 N. C. 694, the exemption was based upon

the distance traveled. An examination of this case will show that this view is based on a misconception of the statute there under consideration. That statute gives to those engaged in the transportation of property between termini, less than fifty miles apart, a lower rate of tax than was imposed upon persons engaged in such transportation between termini more than fifty miles apart. The classification was not based upon actual miles traveled. In its opinion, the Court said:

> "The privilege of engaging in the latter business is more valuable than the privilege of engaging in the former business only. The service furnished by the state to the former is less expensive than the service furnished to the latter. It cannot be said that it is unjust for the state to require a larger license tax to be paid by the licensee who acquires by his license the more valuable privilege, at a greater cost to the state. *** In Brown-Forman Co. v. Kentucky, 217 U. S. 563, 54 L. Ed. 883, it is said: 'A very wide discretion must be conceded to the legislative power of the state in the classification of trades, callings, businesses or occupations which may be subjected to special forms of regulation or taxation through an excise or license tax. If the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of the equal protection of the law'. Upon these principles, it must be held that the statute involved in this action is not in violation of the provisions of section 1 of the fourteenth amendment of the constitution of the United States."

On January 19, 1931, the above decision was affirmed by the United States Supreme Court in a *per curiam* opinion as follows:

"The judgment herein is affirmed. (Carley & Hamilton, Inc. v. Snook, 281 U. S. 66, 72, 73, 50 S. Ct. 204, 74 L. Ed. 704, 68 A. L. R. 194; Packard v. Banton, 264 U. S. 140, 143, 144, 44 S. Ct. 257, 68 L. Ed. 596; Clark v. Titusville, 184 U. S. 329, 332, 333, 22 S. Ct. 382, 46 L. Ed. 569.)" (Clark v. Maxwell, 282 U. S. 811, 75 L. Ed. 262, 51 S. Ct. 211.)

In Carley & Hamilton v. Snook, 281 U. S. 66, 72, the court said:

"That the legislature may graduate the fees according to the propensities of the vehicles to injure or destroy the public highway and may exempt those with respect to which this tendency is slight or non-existent, cannot be doubted. *** It is for the legislature to draw the line between the two classes."

In line with the above decision is the consideration that the amount of tax to be realized must justify the cost and expense of collection. On minor transportation operations the legislature is justified upon this ground in creating an exemption, and the 25-mile limitation affords a proper way of fixing the line.

A recent case, that distinctly recognizes the propriety of a classification predicated upon difficulty of administration and accounting is Chicago, R. I. & Pac. R. Co. v. United States, 76 L. Ed. 93, 52 S. Ct. 87 (decided November 23, 1931). There railroads of less than 100 miles length were exempted from certain features of the car-rental order of the Interstate Commerce Commission; this exemption was sustained because it relieved the small carriers "from the burden of keeping account of a mul-

titude of separate per diem charges, and reporting them separately to the various trunk lines".

It would appear that if all private carriers are exempt from payment of a fee while operating within a radius of 25 miles from their home base, and that all private carriers when operating beyond the 25-mile zone, are required to pay the tax on such trips, there would be no just grounds for complaint on the ground of discrimination.

Coming now to the exemption of private carriers, operating within a twenty-five mile radius from the license and liability insurance requirements, we believe that the conditions justify the distinction made by this provision. The greater congestion of traffic and, consequently, the greater danger to the traveling public, is found upon highways that are most traveled. These are the improved through state highways. Those whose hauling operations are so limited as to keep them within the exemption will use the closest and most direct road which will generally be the county and township roads. Illustrations are the delivery trucks of the city merchants, delivering various commodities to their customers in the suburbs and trade territory. Those who have longer hauls find it to their advantage to seek an improved state highway, and so, make greater use of the improved and more heavily traveled highways.

Judge Kennemer, in his dissenting opinion in this case, quoted at page 40 of appellants' brief, considers the traffic and probability of danger to be as great or greater within a radius of twenty-five miles of a city or village

as outside. But we think it clear that the heavy traffic within such twenty-five mile limit is on the improved state highways, and is made up of those carriers who operate for greater distances. These properly come within the provision of the act and are required by the act to carry the liability insurance.

Another consideration is that in the event that private carriers, engaged in hauling their own property, within the limited area exempted by this provision, do cause injury to other users of the highway, they may ordinarily be subjected to an action for damages in the vicinity or county where the injury is caused.

We again refer to the rule that a state may direct its laws against what it deems an evil as it actually exists, without being obliged to cover the entire field of possible abuses. (Patone v. Pennsylvania, supra, and Hall v. Geiger-Jones, supra.)

In Silver v. Silver, 280 U. S. 117, the Court in speaking of the rights of the State, in placing regulatory provisions upon operators of motor vehicles, to secure the safety of the public, said:

> "In this day of almost universal highway transportation by motor car, we cannot say that abuses originating in the multiplicity of suits growing out of the gratuitous carriage of passengers in automobiles do not present so conspicuous an example of what the legislature may regard as an evil, as to justify legislation aimed at it, even though some abuses may not be hit. Carroll v. Greenwich Ins. Co., 199 U. S. 401, 411, 50 L. Ed. 246, 250, 26 Sup. Ct. Rep. 66; New York ex rel. Bryant v. Zimmerman, 278 U. S. 63, 73, 73 L. Ed. 184, 189, 62 A. L. R. 785, 49 Sup. Ct. Rep. 61. It is enough that the present

statute strikes at the evil where it is felt, and reaches the class of cases where it most frequently occurs."

4. The exemption of "transportation of livestock and farm products to market by the owner thereof or supplies for his own use in his own motor vehicle."

Appellants' contention that the exemption of transportation of livestock and farm products to market by the owner, and the transportation of supplies for one's own use in his own motor vehicle, is entirely arbitrary and in violation of the Fourteenth Amendment, was refuted in the opinion of the trial court.

Again, it will be necessary to bear in mind the considerations, benefits and protections which the legislature had in mind when the act was passed, and to look into the motive which actuated the legislature when the exemption was made. The following rule is set out in Corpus Juris and supported by many authorities:

> "The courts will not declare a tax statute void as a violation of the equal protection guaranty so long as the classification or selection made by it is based on a reason, even though in their opinion the reason is a poor one and the statute itself is unjust." (12 C. J. 1152.)

At 12 C. J. 1153, the following statement is found:

> "As an incident to its power to select the persons and property to be taxed, a state may grant exemptions from taxes imposed by general laws; and such exemptions may be based on any reason that the legislature deems sufficient, with the limitation, however, that they must be founded on some reason and not on mere caprice."

One substantial justification for separate classification of the owner who hauls his own farm products and livestock to market is that in the very nature of things the amount of such hauling by any producer is bound to be limited. Nature does not permit of continuous harvesting and marketing, and such transportation must be limited by the production, and therefore only occasional. It is, so far as those exempted by this provision are concerned, a mere incident of the chief occupation of producing the crops and livestock.

It is clearly distinguishable from the continuous hauling in the business of distributing merchandise and the output of oil wells, mines and other industries. Furthermore, where the owner markets his own farm products and livestock, he commonly uses a nearby road and the haul is short. Where the hauling is for longer distances, as frequently is the case in marketing livestock, it is usually done by professional haulers, who are subject to the provision of the act.

It is contended that millers, commission men, and others, may go out and buy farm products and livestock and secure the benefit of this exemption, even though their operations become continuous and extensive. It is doubtful if the tax is of such consequence as to develop such a practice extensively, but if buyers of farm products do in the future, develop substantial and continuous carrying operations, the legislature can give the problem any necessary attention.

Appellants argue that the implement man and the filling station man, who deliver their implements and gaso-

line to the farmers, and the merchant who delivers his merchandise to his customers, are all incidental and casual users of the highways, and in approximately the same position as the seasonal, casual and incidental transportation of farm products. We do not take this view, but believe that all of these merchants operate a 365-day business and are hauling goods rather continuously; but be this as it may, these private carriers have already been exempted by the earlier city, village and twenty-five mile radius provisions. So appellants' point is not well founded.

Another consideration that has already been mentioned in respect to the twenty-five mile radius exemption is that those engaged in the transportation of their own farm products and livestock are as a general rule contributors to local taxes for highway use.

In Alward v. Johnson, 282 U. S. 509, the Court, in speaking of the general power of a state to classify her property for taxation, and to lay an appropriate tax upon each class, said:

> "It is not possible for us to say that the circumstances of the present cause disclose any arbitrary or unreasonable exertion of such power by the state. The distinction between property employed in conducting a business which requires constant and unusual use of the highways and property not so employed is plain enough. Here the tax laid was exclusive of all other taxation and the funds arising therefrom were assigned to the maintenance of roads, essential to petitioner's operations."

Statutes exempting farmers hauling their own agri-

cultural products to market have been before the courts in a number of cases, and have generally been held valid.

> "No doubt very considerable restrictions might be imposed upon farmers as to the manner of conducting their trade; but while the public authority can restrict them in that respect, it is not obliged to do so as a condition of taxing other persons on their business or avocations." (Davis v. Mayor, etc., of Macon, 64 Ga. 128.)

The 1925 Oregon Motor Carrier Act provided for a 50 per cent additional license fee on commercial motor vehicles used upon the public highways. Among the exemptions, included in the act, was one which exempted vehicles used in delivery to market of the products of husbandry by the owner and grower thereof. In State v. Kozer, 116 Ore. 581, the Oregon Supreme Court justified this exemption on the ground that such transportation was merely incidental to farming operations and did not involve such use of the highways as to justify a greater license fee. The court, at page 590 of its opinion, said:

> "We can readily appreciate that the classifications which this statute makes will in certain isolated cases cause the payment of a tax disproportionate to the damage resulting to the highways, but the constitutionality of the law must not be so tested. We must consider its general application to the classes affected, and not to certain individuals belonging to such classes. Exact equality is not possible. Practical equality is constitutional equality. The human mind has not yet been able to devise any scheme of taxation which will operate with unerring certainty and equality to all situations that may arise." (Southwestern Oil Co. v. Texas, 217 U. S. 114, 54

L. Ed. 688, 30 S. Ct. Rep. 496. See also, Rose's U. S. Notes E: Bell's Gap R. R. Co. v. Pennsylvania, 134 U. S. 232, 33 L. Ed. 892, 10 S. Ct. Rep. 533.)

On page 592, the Court stated further:

> "In this state, motor vehicles used for agricultural purposes are subject to all of the general provisions of the motor vehicle laws, but are exempted from payment of the additional tax for the reason, no doubt, that the legislature was of opinion that 'delivery to market of the products of husbandry by the grower and owner thereof', was merely incidental to farming and that the highways of the state would not be subjected to such a use as would justify a greater license fee."

A Georgia act of 1927 imposed—

> "Upon every person, firm or corporation, engaged in the operation of motor-trucks or trailers for the transportation of freight for hire, $25 for each truck or trailer. Provided, this section shall not apply to persons, firms or corporations hauling farm produce, live stock, and fertilizers exclusively."

The Georgia Supreme Court in its opinion discussed generally the power of the legislature to classify and subclassify, and the general rules applicable thereto, but did not discuss particular reasons why the above exemptions came within the rules.

The court did hold the exemption not unreasonable and not in violation of the due-process clause of the Georgia constitution or the due-process clause of the fourteenth amendment to the federal constitution. Upon the exemption mentioned, the court merely said:

> "The exemption of persons and corporations engaged exclusively in hauling farm produce, livestock and fertilizers, is not unreasonable or arbitrary." (State v. LeFebvre, 174 Minn, 248, 219 N. W. 167; Davis v. Mayor, etc., City of Macon, 64 Ga. 128, 37 Am. Rep. 60.) (Southern Transfer Co. v. Harrison, [Oct. 17, 1930] 171 Ga. 358, 155 S. E. 338.)

In an Iowa case, upholding an Iowa statute, imposing a ton mileage tax on common-carrier vehicles, while not imposing such tax upon vehicles of private carriers, the court said in respect to the different classification of common carriers:

> "We may take judicial notice that commercial motor vehicle transportation and highway maintenance expense, resulting therefrom, is rapidly increasing, and that traffic on the main highways is becoming more and more congested. It is not an unreasonable classification for the legislature to make a distinction between those common carriers whose use of the highway is regular, and hence more frequent, and whose operation is attended with great danger of life and property and great damage to the highways, and those carriers whose use of the highways is only occasional and spasmodic. Such a distinction does not constitute an arbitrary discrimination, provided that the state of facts is sufficient to sustain the classification." (See Liberty Highway Co., et al. v. Michigan Utilities Commission, et al., [S. C.] 294 F. 703, with cases cited.) (Iowa Motor Vehicle Assn. v. Board of Railroad Commissioners, 207 Iowa 461, 221 N. W. 364.)

The Iowa decision was affirmed by the United States Supreme Court, January 6, 1930, in a *per curiam* opinion as follows:

"Decree affirmed upon the authority of Bekins Van Lines v. Riley, 280 U. S. 80, 74 L. Ed. 178, 50 S. Ct. 64." Iowa Motor Vehicle Assn. v. Board of R. R. Comm'rs, 280 U. S. 529, and 4 L. Ed. 595, 59 S. Ct. 151.)

In State v. LeFebvre, 174 Minn. 248, 219 N. W. 167, the court held that a highway tax statute was not invalid—

> "In excluding those engaged exclusively in transporting farm products from the point of production to the primary market, nor in excluding those transporting or delivering dairy products." (Syl. 4.)

Regarding the propriety of these classifications, the Court said:

> "The exemption of transportation companies engaged exclusively in transporting agricultural, horticultural, dairy or other farm products from the point of production to the primary market, and motor vehicles used exclusively in transporting or delivering dairy products is not unreasonable nor arbitrary. *** the legislature might conclude that the conditions surrounding the transportation of agricultural and dairy products from the point of production so differ from ordinary common carrier transportation that a certificate of public convenience and necessity should not be required. Favoritism might have been intended but we do not assume it nor find it. The classification seems on a fair basis."

Insofar as the exemptions of those hauling livestock and farm products to market from the regulatory features of the act is concerned, the legislature must have had in mind the incidental and occasional use of the highways that we have already referred to. Presumably

such use appeared not to be of such moment as to justify the imposition of the insurance policy requirement or to merit the large amount of administrative effort that would be required to enforce the safety regulation of the commission.

We believe that this exemption is also subject to the rule that a state may direct its laws against what it deems an evil, as it actually exists, without covering the whole field of possible abuses. (Patsone v. Pennsylvania, supra; also Hall v. Geiger-Jones, supra.)

The right of the Legislature to make class exemptions because of incidental use of the road, was given specific consideration in a case in which an attack was made on the Wisconsin law. The Court held:

> "Wisconsin Laws 1923, Ch. 320, prescribing legislation for motor vehicles, is not subject to objection that it is class legislation, on the grounds that tractors hauling agricultural equipment are exempt; the use of roads by such tractors being incidental merely." (State v. Zimmerman, 181 Wis. 552.)

5. The exemption of transportation of children to and from school.

It would not appear that there could be any serious objection to the exemption as to the transportation of children to and from school. This is a public function, performed at public expense. The state is not required to tax one of its own agencies. Such public agency can fairly be exempted from taxation for the same reason that municipal property and bonds are.

It would also appear that the question of safe opera-

tion of such vehicles can be properly left to the school authorities who are directly responsible therefor. On page 45 of appellants' brief, the following statement is found:

> "This exemption was held constitutional by the court in this case, and in Louis v. Boynton, l. c. 473. In this case the following reasons are given, l. c. 352:
>
> > 'Nor can there be any serious question about the exemption as to the transportation of children to and from schools. This public agency can be fairly exempted from taxation for the same reason that municipal bonds are; the question of the safe operation of such vehicles can be properly left to the school authorities, who are directly responsible therefor.'
>
> "The court, however, in passing upon this exemption has considered it only from the standpoint of a revenue measure, and it has overlooked the public safety provision which in the case of children is even more important than that of adults."

The appellant appears to be satisfied by the court's reason for holding the tax exemption valid. The statement, however, that the court overlooks the public safety provision would appear to be erroneous. The last sentence set out in the above quotation from the opinion of the Louis v. Boynton case, covers the public safety provision with the statement that the question of the safe operation of such vehicles can be properly left to the school authorities who are directly responsible therefor.

The question of the exemption of carriers engaged ex-

clusively in the transportation of children to and from school was before the Supreme Court of Minnesota in State v. LeFebvre, 174 Minn. 248, 255. The court said:

> "The exemption of carriers engaged exclusively in the transportation of children to and from school is not unreasonable or arbitrary. School busses are not common carriers within the meaning of the statute. They convey children in certain localities to certain schools and are operated by the districts and under contract with them."

A similar contention was overruled in Smallwood v. Jeter, 42 Idaho 169, 244.

6. Do Sections 2, 17, 19, 23 and 24 impose obligations upon appellants to which the State had no constitutional authority to subject them, or fail to define such obligations with a fair degree of certainty?

On page 46 of their brief appellants contend that Sections 2, 17, 19, 23 and 24, taken in conjunction with the entire act, impose upon the appellants obligations and duties which the State had no authority to subject them to, or else said sections fail to define such obligations with a fair degree of certainty which is required of criminal statutes.

Section 17 of the Act is simply a provision for the collection of the tax. It places a penalty equal to one and one-half per cent per month for delinquency in the payment of the tax, and provides means of levy on the property of the carrier if the tax is not paid. There is nothing ambiguous about this section and most certainly if the State has the right to levy the tax it has

the authority to provide proper means for its collection.

Section 19 of the Act provides that failure on the part of a carrier to comply with the provisions of the Act, or to give the Commission access to its books or records, constitutes a misdemeanor. The ownership and financial condition of the carrier is material to the Commission in connection with the collection of the tax. If the tax is to be collected some books and accounts must be kept by the carrier, which will reflect the mileage of their trucks. The legislature has power to authorize the Commission to require such bookkeeping and such reports as will show the mileage of the trucks, and it would certainly follow that the Commission had authority to examine the books and records so kept for the purpose of checking the accuracy of the reports filed by the carriers and determining the correct amount of the tax.

In connection with examination of the books and records, section 19 goes no further than to place a penalty upon the carrier for refusal to give access to this necessary information. There could be nothing ambiguous about this section of the law.

Section 23 of the Act simply makes violation of its provisions or of the regulations of the Commission a misdemeanor, and Section 24 provides the manner of prosecution.

The appellants further contend that it is impossible from the language of the act to determine the extent of the exemptions under Section 2. Their first objection is that it is impossible for them to determine whether

they are free from tax only in the city or village where their plant is located or in any city or village in which they operate. Section 2 of the Act provides as follows: "This act shall not apply to motor carriers who shall operate wholly within any city or village of this state." We can see no ambiguity in this section. When a carrier leaves the city in which his business is located and operates through rural territory or other cities it is not operating wholly within "any city or village," and its passage through such other cities or villages is incidental to the traffic on the main highway from city to city.

7. Powers given public service commission by Sections 5, 8, 16, 17, 19, 22 and 23.

Appellants, under this heading, refer to the provisions requiring private carriers of property to obtain a license and to make their books and records available to the inspection of the Commission, providing for payment of fees, and penalties in certain cases, authorizing revocation of licenses, making violations of the provisions of the act and of regulations of the Commission, a misdemeanor, and providing penalty therefor. But the chief attack of the appellants is upon Section 5 of the act, which is printed upon page 51 of their brief.

The first sentence of Section 5 deals solely with public carriers, and gives the Commission power to fix their rates and classifications. The second sentence refers to public, contract and private motor carriers of property. It reads as follows:

"And the Public Service Commission is hereby

> vested with power and authority, and it shall be its duty to license, supervise and regulate every public motor carrier of property or of passengers, contract motor carrier of property or of passengers, and private motor carrier of property in the state, and to regulate and supervise the accounts, schedules, service and method of operation of same; to prescribe a uniform system and classification of accounts to be used; to require the filing of annual and other reports and any other data; and to supervise and regulate 'public motor carriers of property or of passengers', 'contract motor carriers of property or of passengers' and 'private motor carriers of property', in all matters affecting the relationship between such 'public motor carriers of property or of passengers', 'contract motor carriers of property or of passengers', and 'private motor carriers of property', and the traveling and shipping public." (R. 13)

In the sentence quoted above, the Commission was given the power to secure full information upon which to determine the amount of the tax for which the various carriers are liable.

We think a fair construction of it will authorize only such requirements on the part of the Commission as are necessary to effect this purpose. We see in this provision no intent on the part of the Legislature to authorize the Commission to subject private carriers to the duties and regulations which, under the law, can be imposed only on common carriers. Appellants make no complaint of the Commission having taken any objectionable action under this provision. And in the event that the Commission should make any unconstitutional requirement, then the invalidity would be of regulation and not of statute.

The third sentence of said Section 5 authorizes the Commission, by general order or otherwise, to prescribe necessary rules and regulations covering all motor carriers. Clearly this authorizes only such rules and regulations as are necessary to carry out the intention and purpose of the act, and affords no basis for anticipation that the Commission will make rules and regulations violating appellant's constitutional rights.

Appellants' chief complaint as to Section 5 is based on the fourth and last sentence thereof, which reads as follows:

> "All laws relating to the powers, duties, authority and jurisdiction of the Public Service Commission over *common carriers* are hereby made applicable to all *such motor carriers* except as herein otherwise specifically provided." (R. 13, italics ours.)

Appellants cite several works on grammar as authority for construing this provision to subject private and contract carriers, as well as public motor carriers, to all laws of the state affecting common carriers. This would be a drastic and far-reaching construction indeed, and should be arrived at only in the event the language used compels such construction. We think this sentence covers its own separate sphere, and that the rule of last immediate antecedent is applicable. In other words, that the word "such" in the line before the last, refers to "common carriers" as its antecedent, and makes the common carrier law applicable to such motor carriers as are actually common carriers. This was the construction adopted by the trial court. It makes a reasonable

and sensible provision, and in our judgment, is clearly entitled to be adopted, rather than the one which would have the effect of invalidating either the entire act or a part of the act.

We think this statute comes well within the rule that where a statute is reasonably susceptible of two interpretations, one of which would render it unconstitutional and the other valid, it is the duty of the courts to adopt that construction which will uphold its validity; there being a strong presumption that the law-making body has intended to act within, and not in excess of, its constitutional authority. (Plymouth Coal Co. v. Pennsylvania, 232 U. S. 531.)

In United States v. Ryan, 76 L. Ed. 71, the Court, in speaking of the proper manner of construing a statute, said:

> "All laws are to be given a sensible construction. A literal application of a statute, which would lead to absurd consequences, is to be avoided whenever a reasonable application can be given which is consistent with the legislative purpose."

It appears to appellees that the carriers should have no difficulty in determining whether they are operating wholly within a city, in which their business or base is located, or whether they are leaving such local base and operating principally upon the highways of the state but incidentally in other cities, through which they may happen to pass.

Appellants' next objection is that they are unable to determine, under the twenty-five mile exemption provided

for in Section 2, whether a radius of twenty-five miles beyond the corporate limits of any such city or village is absolutely free from taxation or becomes a taxable radius when the motor vehicle goes to some point beyond the twenty-five mile radius, and then whether or not only the mileage outside of the twenty-five mile radius is taxable, or whether the entire mileage covered by the motor vehicle, on its entire trip, is taxable. The first phrase under Section 2, exempts all carriers who operate wholly within the city limits. The second phrase "or private motor carriers who operate within a radius of twenty-five miles beyond the corporate limits of such city, or any village", was drawn in favor of the local private carrier, who operates within the twenty-five mile zone, outside the city in which its business is located.

As to this exemption, the court below stated:

> "It is also to be observed that the phrase uses the expression 'within a radius'. The use of the word 'radius' indicates a center. That center must be the city. What city? The statute says 'such city'. 'Such' refers back to motor carriers 'who operate wholly within any city'. We think a fair construction of the statute is that there is exempted private carriers who have an established place of business within a city, be they resident or non-resident, and who use that city as a center of the operations of that vehicle."

There appears to be no particular difficulty presented by the language of the statute in arriving at this construction. Appellants in asserting inability to construe this statute state: "Should appellants fail to construe the provisions of this act, they are subject to arrest and

prosecution". They base this contention principally upon Smith v. Cahoon, supra. In that case, appellant had been arrested for operating his truck without a license. When the appellant was arrested, the statute had not been construed. The question to be determined was whether or not the appellant could be restrained of his liberty for violating the statute, the terms of which were obscure, and which had not been construed by the courts. In releasing the appellant in the Smith v. Cahoon case, the Supreme Court said: "It should be observed that this is not an action in equity, where the enforcement of the statute awaits the final determination of the court as to validity and scope". The Supreme Court further stated that: "until such separation has been accomplished by judicial decision, the statute remains uncertain".

The present case is an action in equity, where the enforcement of the statute awaits the construction of the court. The provisions of the Kansas statute are not so hopelessly intermingled as those of the Florida act, and the statute has now been construed. The appellants have not been arrested or deprived of their liberty. The construction placed upon the law by the court, if followed by the appellants, eliminates any question of their future arrest because of misconstruction of the statute. After a statute has been clearly construed by a court, the objections raised by appellants are without merit. For these reasons we do not believe that the rule stated in the Smith v. Cahoon case applies here.

8. The provisions of Section 21 requiring a liability insurance policy conditioned to pay compensation to injured persons or damage to property resulting from negligent operations.

It is our opinion that this section is not intended to protect passengers or cargo carried. The provision is only intended to protect third persons from injuries to their person or property, and to guarantee compensation therefor for such injuries incurred by reason of the negligence of the carrier. This construction is the more reasonable because the construction contended for by appellants could not lawfully be applied to the transportation of goods or passengers by appellants' private carriers, or by contract carriers for hire, who are not common carriers, or by carriers of interstate commerce. It would be an unreasonable construction indeed to require private carriers to carry insurance to indemnity themselves for damages to their own goods by their own negligence.

If Section 21 is construed as imposing liability insurance requirements for the protection of third persons for injuries to their person or property, and not to the passengers and cargo carried, the requirement is valid. (42 C. J. 710: Re Opinion of the Justices, 81 N. H. 566.) So construed, this liability insurance provision does not in any sense discriminate against appellants, since the various exemptions provided by the act are justified for the same reasons as have been heretofore discussed.

V.

CONCLUSION.

Appellees respectfully submit, in conclusion, that Chapter 236 of the Laws of Kansas 1931, is a valid exercise of the State's power to control the use of the State's highway system; that the classification of carriers found in the act has a reasonable and logical basis in connection with the purposes sought to be accomplished; that because of the dissimilarity of the two statutes, this case is not controlled by Smith v. Cahoon; and that the decree of the court below should be affirmed.

ROLAND BOYNTON,
WALTER T. GRIFFIN,
CHARLES W. STEIGER,
EARL H. HATCHER,
Solicitors for Appellees.

SUPREME COURT OF THE UNITED STATES.

No. 677.—October Term, 1931.

Continental Baking Company, General Baking Company, Schulze Baking Company, et al., Appellants, *vs.* Harry H. Woodring, as Governor of the State of Kansas, et al., etc., et al.	Appeal from the District Court of the United States for the District of Kansas.

[May 23, 1932.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

This is an appeal from a final decree of the District Court, composed of three judges as required by statute, which dismissed, on motion, the bill of complaint in a suit brought to restrain the enforcement of the Motor Vehicle Act of Kansas. Laws of 1931, chap. 236; *Continental Baking Company* v. *Woodring, Governor*, 55 F. (2d) 347.

Plaintiffs are "private motor carriers of property", operating bakeries in Kansas and other States and making deliveries to their customers by their own trucks. They contend that the statute, by reason of the obligations it imposes, and of its classifications, violates the due process and equal protection clauses of the Fourteenth Amendment, the provision as to the privileges and immunities of citizens (Art. IV, sec. 2), and the commerce clause (Art. I, sec. 8, par. 3), of the Federal Constitution.

The statute relates to motor vehicles, comprehensively defined, when used upon any public highway of the State for the purpose of transporting persons or property. It applies to those who are engaged in such transportation as "public motor carriers" of property and passengers, "contract motor carriers" of property and passengers, and "private motor carriers of property." "Public motor carrier" means one transporting "for hire as a common carrier having a fixed termini or route". "Contract motor carrier" of property means one who is not a "public motor carrier" and is engaged in transportation "for hire as a business". "Private motor carrier of property" means one transporting "property sold

or to be sold by him in furtherance of any private commercial enterprise". Sec. 1.[1] The Act does not apply to (1) motor carriers operating wholly within any city or village of the State, (2) private motor carriers operating within a radius of twenty-five miles beyond the corporate limits of such city or village, (3) the transportation of livestock and farm products to market "by the owner thereof or supplies for his own use in his own motor vehicle", and (4) the transportation of children to and from school. Sec. 2.[2] Public motor carriers are declared to be common carriers within the meaning of the public utility laws of the State and subject to regulation accordingly, including that of rates and charges. Sec. 3.[3] Public motor carriers, contract motor carriers,

[1] "Section 1 (a). The term 'motor vehicle' when used in this act means any automobile, automobile truck, trailer, motor bus, or any other self-propelled or motor-driven vehicle used upon any public highway of this state for the purpose of transporting persons or property. (b) The term 'public motor-carrier of property' when used in this act shall mean any person engaged in the transportation by motor vehicle of property for hire as a common carrier having a fixed termini or route. (c) The term 'contract motor carrier of property' when used in this act shall be construed to mean any person not a public motor carrier of property engaged in the transportation by motor vehicle of property for hire as a business. (d) The term 'private motor carrier of property' when used in this act shall be construed to mean any person engaged in the transportation by motor vehicle of property sold or to be sold by him in furtherance of any private commercial enterprise. (e) The term 'public motor carrier of passengers' when used in this act shall mean any person engaged in the transportation by motor vehicle of passengers or express for hire as a common carrier having a fixed termini or route. (f) The term 'contract motor carrier of passengers' when used in this act shall be construed to mean any person not a public motor carrier of passengers engaged in the transportation by motor vehicle of passengers or express for hire. (g) The term 'public highway' when used in this act shall mean every public street, road or highway or thoroughfare of any kind used by the public."

[2] "Sec. 2. That this act shall not apply to motor carriers who shall operate wholly within any city or village of this state, or private motor carriers who operate within a radius of twenty-five miles beyond the corporate limits of such city, or any village, nor to the transportation of livestock and farm products to market by the owner thereof or supplies for his own use in his own motor vehicle; or to the transportation of children to and from school."

[3] "Sec. 3. All 'public motor carriers of property or passengers' as defined in this act are hereby declared to be common carriers within the meaning of the public utility laws of this state, and are hereby declared to be

and private motor carriers of property are forbidden to operate motor vehicles for compensation on any public highway except in accordance with the provisions of the Act. Sec. 4.[4] The public service commission is vested with supervision of these carriers in all matters affecting their relationship "with the traveling and shipping public" and, specifically, to prescribe regulations in certain particulars hereinafter mentioned. Sec. 5.[5] All transportation charges made by public motor carriers must be just and reasonable. Sec. 6. Public motor carriers in intrastate commerce must obtain certificates of convenience and necessity. Sec. 7. Contract motor carriers and private motor carriers of property "either in intrastate commerce or in interstate commerce" must

---

affected with a public interest and subject to this act and to the laws of this state, including the regulation of all rates and charges now in force or that hereafter may be enacted pertaining to public utilities and common carriers as far as applicable, and not in conflict herewith."

[4] "Sec. 4. No public motor carrier of property or passengers, contract motor carrier of property or passengers or private motor carrier of property shall operate any motor vehicle for the transportation of either persons or property for compensation on any public highway in this state except in accordance with the provisions of this act."

[5] "Sec. 5. The public service commission is hereby vested with power and authority and it shall be its duty to license, supervise and regulate every public motor carrier of property or of passengers in this state and to fix and approve reasonable maximum or minimum or maximum and minimum rates, fares, charges, classifications and rules and regulations pertaining thereto. And the public service commission is hereby vested with power and authority and it shall be its duty to license, supervise and regulate every public motor carrier of property or of passengers, contract motor carrier of property or of passengers and private motor carrier of property in the state and to regulate and supervise the accounts, schedules, service and method of operation of same; to prescribe a uniform system and classification of accounts to be used; to require the filing of annual and other reports and any other data; and to supervise and regulate 'public motor carriers of property or of passengers,' 'contract motor carriers of property or of passengers' and 'private motor carriers of property,' in all matters affecting the relationship between such 'public motor carriers of property or of passengers,' 'contract motor carriers of property or of passengers' and 'private motor carriers of property' and the traveling and shipping public. The public service commission shall have power and authority by general order or otherwise to prescribe reasonable and necessary rules and regulations governing all such motor carriers. All laws relating to the powers, duties, authority and jurisdiction of the public service commission over common carriers are hereby made applicable to all such motor carriers except as herein otherwise specifically provided."

obtain licenses. Application therefor must give information as to ownership, financial condition and equipment, and such further facts as the public service commission may request. The commission is required, upon receipt of this information and on compliance with the regulations and payment of fees, to issue a license. Sec. 8.[6] In addition to license fees, public motor carriers, contract motor carriers, and private motor carriers of property must pay a tax of "five-tenths mill per gross ton mile," computed in the manner described, for the administration of the Act and for the maintenance and reconstruction of the public highways. Sec. 13.[7] Every motor carrier covered by the Act must keep daily records, upon prescribed forms, of all vehicles used and must certify under oath summaries showing the ton miles traveled monthly and such other information as the commission may require. Sec. 15.[8] The commission is empowered to enforce the provisions

[6] "Sec. 8. It shall be unlawful for any 'contract motor carrier of property or passengers' or 'private motor carrier of property' to operate as a carrier of property or passengers within this state either in intrastate commerce or in interstate commerce without first having obtained from the public service commission a license therefor. An application shall be made to the public service commission in writing stating the ownership, financial condition, equipment to be used and physical property of the applicant, and such other information as the commission may request. Upon receipt of such information and on compliance with the regulations and payment of fees, the public service commission shall issue a license to such applicant."

[7] "Sec. 13. In addition to the regular license fees or taxes imposed upon 'public motor carriers of property or of passengers,' 'contract motor carriers of property or of passengers,' and 'private motor carriers of property,' there shall be assessed against and collected from every such carrier a tax of five-tenths mill per gross ton mile for the administration of this act and for the maintenance, repair and reconstruction of the public highways. The said gross ton mileage shall be computed: (a) The maximum seating capacity of each passenger carrying vehicle shall be estimated at 150 pounds per passenger seat; to this sum shall be added the weight of the vehicle, the total shall then be multiplied by the number of miles operated, and the amount thus obtained divided by 2,000; (b) 200 per cent of the rated capacity of each property carrying vehicle plus the weight of the vehicle shall be multiplied by the number of miles the vehicle is operated, and the amount thus obtained divided by 2,000."

[8] "Sec. 15. Every motor carrier to which this act applies shall keep daily records upon forms prescribed by the commission of all vehicles used during the current month. On or before the 25th day of the month following, they shall certify under oath to the commission, upon forms prescribed therefor,

of the Act and to inspect the books and documents of all carriers to which the Act applies. Sec. 16.[9] Of the moneys received under the provisions of the Act twenty per cent is to be applied to administration and enforcement and the remainder is to be placed to the credit of the State's highway fund. Sec. 18.[10] No certificate or license is to be issued by the commission to any of the described motor carriers until a liability insurance policy approved by the commission has been filed "in such reasonable sum as the commission may deem necessary to adequately protect the interests of the public with due regard to the number of persons and amount of property involved, which liability insurance shall bind the obligors thereunder to pay compensation for injuries to persons and loss of or damage to property resulting from the negligent operation of such carrier." No other or additional bonds or licenses than those prescribed in the Act are to be required by any city or town or other agency of the state. Sec. 21.[11] The commission may promulgate rules relating

summaries of their daily records which shall show the ton miles traveled during the preceding month, and such other information as the commission may require. . . ."

[9]"Sec. 16. The commission is hereby empowered to administer and enforce all provisions of this act, to inspect the books and documents of all carriers to which this act applies, and to expend such amount of the sum collected hereunder as is necessary for such purposes upon requisition by the commission to the state auditor: *Provided, however,* The total sum to be expended as provided in this section shall not exceed during the calendar year twenty per cent of the total gross sum collected under this act. . . ."

[10]"Sec. 18. All moneys received under the provisions of this act shall be distributed: (a) For administration and enforcement of the provisions of this act, twenty per cent shall be held by the state treasurer for the use of the public service commission; (b) the balance the said treasurer shall place to the credit of the highway fund of the state and it shall become a part thereof."

[11]"Sec. 21. No certificate or license shall be issued by the public service commission to any 'public motor carrier of property,' 'public motor carrier of passengers,' 'contract motor carrier of property or passengers' or 'private motor carrier of property,' until and after such applicant shall have filed with, and the same has been approved by, the public service commission, a liability insurance policy in some insurance company or association authorized to transact business in this state, in such reasonable sum as the commission may deem necessary to adequately protect the interests of the public with due regard to the number of persons and amount of property involved, which liability insurance shall bind the obligors thereunder to pay compen-

to the maintenance of vehicle units in a safe and sanitary condition, and making provision as to qualifications and hours of service of operators and for the reporting of accidents. Sec. 22.[12] Violation of the Act or of any order of the commission is made a misdemeanor. Sec. 23.[13]

The general situation to which the statute is addressed is thus described by the District Court (55 F. (2d) at pp. 350, 351): "The State of Kansas has constructed at great expense a system of im-

---

sation for injuries to persons and loss of or damage to property resulting from the negligent operation of such carrier. No other or additional bonds or licenses than those prescribed in this act shall be required of any motor carrier by any city or town or other agency of the state."

[12] "Sec. 22. The commission shall promulgate and publish in the official state paper, and mail to each holder of a certificate or license hereunder, such regulations as it may deem necessary to properly carry out the provisions and purposes of this act. The commission may at any time, for good cause, suspend, and, upon at least five days' notice to the grantee of any certificate and an opportunity to be heard, revoke or amend any certificate. Upon the commission finding that any public carrier does not give convenient, efficient and sufficient service as ordered, such public carrier shall be given a reasonable time to provide such service before any existing certificate is revoked or a new certificate granted. Any rules promulgated by the commission shall include: (a) Every vehicle unit shall be maintained in a safe and sanitary condition at all times. (b) Every operator of a motor vehicle used as a public carrier shall be at least twenty-one years of age; and every operator of other carriers to which this act applies shall be at least sixteen years of age; and all such operators shall be of good moral character and fully competent to operate the motor vehicle under his charge. (c) Hours of service for operators of all motor carriers to which this act applies shall be fixed by the commission. (d) Accidents arising from or in connection with the operation of carriers shall be reported to the commission in such detail and in such manner as the commission may require: *Provided,* That the failure to report any such accident within five days after the happening thereof shall be deemed willful refusal to obey and comply with a rule of the commission. (e) The commission shall require and every carrier shall have attached to each unit or vehicle such distinctive marking as shall be adopted by the commission."

[13] "Sec. 23. Every carrier to which this act applies and every person who violates or who procures, aids or abets in the violating of any provision of this act, or who fails to obey any order, decision or regulation of the commission, or who procures or aids or abets any person in his failure to obey such order, decision or regulation, shall be deemed guilty of a misdemeanor and upon conviction shall be punished by a fine of not exceeding $500. . . ."

proved highways. These have been built in part by special benefit districts and in part by a tax on gasoline sold in the State and by license fees exacted of all resident owners of automobiles. These public highways have become the roadbeds of great transportation companies, which are actively and seriously competing with railroads which provide their own roadbeds; they are being used by concerns such as the plaintiffs for the daily delivery of their products to every hamlet and village in the State. The highways are being pounded to pieces by these great trucks which, combining weight with speed, are making the problem of maintenance wellnigh insoluble. The Legislature but voiced the sentiment of the entire State in deciding that those who daily use the highways for commercial purposes should pay an additional tax. Moreover, these powerful and speedy trucks *are the menace of the highways*".

It is apparent that Kansas, in framing its legislation to meet these conditions, did not attempt to compel private carriers to become public carriers. The legislature did not purport to put both classes of carriers upon an identical footing and subject them to the same obligations. See *Smith* v. *Cahoon*, 283 U. S. 553, 563; *Michigan Commission* v. *Duke*, 266 U. S. 570, 576-578; *Frost Trucking Co.* v. *Railroad Commission*, 271 U. S. 583, 592. It recognized and applied distinctions. 'Public' or common carriers, and not private carriers, are required to obtain certificates of public convenience and necessity. The former, and not the latter, are put under regulations as to fares and charges. While, with respect to certain matters, both are placed under the general authority given to the public service commission to prescribe regulations, it does not appear from the bill of complaint that any regulation has been prescribed, or that the commission has made any order, of which private carriers may properly complain. The statute itself, however, does impose certain obligations upon private motor carriers of property, and the first question is whether these provisions violate the constitutional restrictions invoked.

First. "Private motor carriers of property" must obtain a license, pay a tax and file a liability insurance policy. The public service commission has no authority to refuse a license if the described information is given with the application, the liability insurance policy is filed, and there is compliance with the regulations and payment of the license fee (Sec. 8).[14] It is not shown

[14]See Note 6.

that either regulations or license fees are unreasonable. The tax and the license fees, over the expenses of administration, go to the highway fund of the State for the maintenance and reconstruction of the highways the carrier is licensed to use. The insurance policy is to protect the interests of the public by securing compensation for injuries to persons and property from negligent operations of the carriers. (Sec. 21).[15] The District Court approved an earlier decision, also by a District Court of three Judges, that this provision was not intended to require "security for passengers or cargoes carried, but only to protect third persons from injuries to their persons or property.". 55 F. (2d) at p. 357; *Louis* v. *Boynton*, 53 F. (2d) 471, 473. This is an admissible construction and no different application of the provision appears to have been made by either the state court or the commission.

Requirements of this sort are clearly within the authority of the State which may demand compensation for the special facilities it has provided and regulate the use of its highways to promote the public safety. Reasonable regulations to that end are valid as to intrastate traffic and, where there is no discrimination against the interstate commerce which may be affected, do not impose an unconstitutional burden upon that commerce. Motor vehicles may properly be treated as a special class, because their movement over the highways, as this Court has said, "is attended by constant and serious dangers to the public, and is also abnormally destructive to the ways themselves." *Hendrick* v. *Maryland*, 235 U. S. 610, 622; *Kane* v. *New Jersey*, 242 U. S. 160, 167; *Michigan Commission* v. *Duke, supra; Interstate Busses Corporation* v. *Blodgett*, 276 U. S. 245, 250, 251; *Sprout* v. *South Bend*, 277 U. S. 163, 169, 170; *Hodge Company* v. *Cincinnati*, 284 U. S. 335, 337.

Objection to the tax is made on the score of uncertainty, in view of the exemptions of motor carriers operating wholly within a city or village, and of private motor carriers operating "within a radius of twenty-five miles beyond the corporate limits of such city, or any village". (Sec. 2).[16] This objection is distinct from that of unconstitutional discrimination, shortly to be considered. We perceive no uncertainty by reason of the first exemption which definitely applies to cases of operation exclusively within the limits of a city or village. As to the second exemption, the state authori-

[15] See Note 11.

[16] See Note 2.

ties assert, and it is not denied, that in the administration of the Act the public service commission has taken the exemption to mean that "so long as private carriers operate within a radius of twenty-five miles of their [illegible]e city or base they are not subject to the payment of the fe[illegible] Even though they have made trips outside the twenty-five mile [illegible]dius, which subjects them to the law and to the payment of ta[illegible]r such trips, they are still not subject to the payment of a tax [illegible]ips made entirely within the twenty-five mile zone." The District Court expressed the opinion that the provision "can and should be construed as intending to exempt from the tax those carriers who either have an established place of business or an established delivery point, with trucks domiciled in any city, and that such trucks may operate in that city and within a twenty-five mile radius free of any tax", and the court said that it agreed with the construction of the commission that "if such a truck goes beyond the twenty-five mile limit", "only the excess is taxable". 55 F. (2d) at p. 356. On this construction, it cannot be said that there is a fatal defect in definition. The tax itself is certain, as in the process of laying the tax it is necessarily made certain before any penalty can be imposed for non-payment. The tax is to be assessed and collected on the basis of gross ton miles and this mileage is to be computed in a prescribed manner. When the tax is assessed, the ordinary remedies will be available for contesting it, if the assessment is not in accordance with the law. No impropriety in assessment or in collection as to these appellants, or denial of remedy, is disclosed. Nor is the amount of the tax, which the State could lay in its discretion for the lawful purposes declared, shown to be unreasonable.

The objection to the authority given to the public service commission "to regulate and supervise the accounts, schedules, service and method of operation", "to prescribe a uniform system and classification of accounts", to require the filing of reports and data, and generally to "supervise and regulate" all the carriers to which the Act applies "in all matters affecting the relationship" between such carriers and "the traveling and shipping public. (Sec. 5)[17] similarly raises no question which can now be considered, as there has been no action or threat of action, so far as appears, by the commission giving ground for the contention that

[17]See Note 5.

the constitutional rights of the appellants have been or will be invaded. This is not a case like that of *Smith* v. *Cahoon, supra*, where the requirements of the statute itself, as distinguished from action of the state commission under it, had such an objectionable generality and vagueness as to the obligations imposed upon private carriers that they provided no standard of conduct that it was possible to know and exposed the persons concerned to criminal prosecution before any suitably definite requirement had been prescribed. In the instant case, the statute itself clearly distinguishes in fundamental matters between the obligations of public and private carriers and places upon the latter certain requirements which the State had power to impose. Whatever uncertainty may exist with respect to possible regulations of the commission will be resolved as regulations are promulgated. If any of these transcend constitutional limits, appellants will have their appropriate remedy. The provision as to keeping records and furnishing reports and information and as to maintaining uniform methods of accounting, may in the case of private carriers of property be assumed, until the contrary appears, to have relation, as the state authorities assert, to the determination of the amount of the tax to which the private carriers are properly liable. The general grant of authority to the public service commission over all the carriers described, including both public and private carriers, in all matters affecting their relationship with the traveling and shipping public, we think should be taken distributively in the light of the context and of the manifest distinctions in the relation of different sorts of carriers to the public. The distinction made by the statute between public and private carriers with respect to the obtaining of certificates of public convenience and necessity, and as to rates and charges, indicates the intention to keep separate the special responsibilities of public carriers from the more limited but still important duties which are owing as well by private carriers, in protecting the public highways from misuse and in insuring safe traffic conditions, and there is no reason to conclude that the authority given to the commission will not be viewed and exercised accordingly. We agree with the District Court that the last clause of section 5, providing that "all laws relating to the powers, duties, authority and jurisdiction of the public service commission over common carriers are hereby made

applicable to all such motor carriers except as herein otherwise specifically provided", applies to public and not to private carriers.

The duty laid upon the commission (Sec. 22)[18] to insist that motor vehicles shall be maintained "in a safe and sanitary condition", to prescribe qualifications of operators as to age and hours of service, and to require the reporting of accidents, has manifest reference to considerations of safety. The terms of the statute do not require action by the commission which does not have reasonable relation to that purpose. In this respect, as well as in relation to the other matters above-mentioned, appellants had no right to resort to equity merely because of an anticipation of improper or invalid action in administration. *Smith* v. *Cahoon, supra,* at p. 562; *Dalton Adding Machine Company* v. *State Corporation Commission,* 236 U. S. 699, 700, 701; *Champlin Refining Company* v. *Corporation Commission,* decided May 16, 1932.

Second. The challenged exemptions are set forth in section 2.[19] The first, which excludes from the application of the Act motor carriers who operate wholly within a city or village of the State, has an obviously reasonable basis, as such operations are subject to local regulations. In protecting its highway system the State was at liberty to leave its local communities unembarrassed, and was not bound either to override their regulations or to impose burdensome additions.

The second exemption extends only to certain private motor carriers. Under the construction above stated, the exemption provides immunity from the provisions of the Act for carriers of that class who have an established place of business or base of operations within a city or village and operate within a radius of twenty-five miles beyond the municipal limits. The first question is whether the State, in legislation of this sort, may provide for such carriers an exempt zone contiguous to its municipalities. We find no difficulty in concluding that it may. As the District Court pointed out, there is "a penumbra of town" that is outside municipal limits and delivery trucks, of those having establishments within the municipalities, in their daily routine repeatedly cross these limits "in going back and forth into these outlying additions". The court found that trucks of that class "use the state improved

[18]See Note 12.

[19]See Note 2.

highways but slightly, for the streets of these outlying additions are not generally a part of the state system". The District Court also directed attention to the fact that "the practical difficulty of keeping track of the mileage of such delivery trucks as they cross back and forth is well-nigh insuperable" and that "the revenue to be gained from such use would be insignificant and the cost of collection large". We think that the legislature could properly take these distinctions into account and that there was a reasonable basis for differentiation with respect to that class of operations. In this view, the question is simply whether the fixing of the radius at twenty-five miles is so entirely arbitrary as to be unconstitutional. It is obvious that the legislature in setting up such a zone would have to draw the line somewhere, and unquestionably it had a broad discretion as to where the line should be drawn. In exercising that discretion, the legislature was not bound to resort to close distinctions or to attempt to define the particular differentiations as to traffic conditions in territory bordering on its various municipalities. *Ohio Oil Company* v. *Conway*, 281 U. S. 146, 159. This Court has frequently held that the mere selection of a mileage basis in the regulation of railroads cannot be considered a violation of the Federal Constitution. The practical convenience of such a classification is not to be disregarded in the interest of a purely theoretical or scientific uniformity. *Columbus & Greenville Rwy. Co.* v. *Miller*, 283 U. S. 96, 101; *Dow* v. *Beidelman*, 125 U S. 680, 691; *New York, New Haven & Hartford R. Co.* v. *New York*, 165 U. S. 628, 633, 634; *Chicago, Rock Island & Pacific Rwy. Co.* v. *Arkansas*, 219 U. S. 453; *Chesapeake & Ohio Rwy. Co.* v. *Conley*, 230 U. S. 513, 522; *St. Louis, Iron Mountain & Southern Rwy. Co.* v. *Arkansas*, 240 U. S. 518, 521; *Wilson* v. *New*, 243 U. S. 332, 341, 354; *Clark* v. *Maxwell*, 282 U. S. 811; *Chicago, Rock Island & Pacific Rwy. Co.* v. *United States*, 284 U. S. 80, 93. No controlling considerations have been presented to overcome the presumption attaching to the legislative action in this case in fixing the radius of the zone for the purpose of establishing an exemption otherwise valid.

The third exemption applies to "the transportation of livestock and farm products to market by the owner thereof or supplies for his own use in his own motor vehicle". In *Smith* v. *Cahoon*, *supra*, the state statute, which applied to all carriers for compen-

sation over regular routes, including common carriers, exempted from its provisions "any transportation company engaged exclusively in the transporting of agricultural, horticultural, dairy or other farm products and fresh and salt fish and oysters and shrimp from the point of production to the assembling or shipping point en route to primary market, or to motor vehicles used exclusively in transporting or delivering dairy products". The stated distinction was thus established between carriers, and between private carriers, notwithstanding the fact that they were "alike engaged in transporting property for compensation over public highways between fixed termini or over a regular route." The Court was unable to find any justification for this discrimination between carriers in the same business, that is, between those who carried for hire farm products, or milk or butter, or fish or oysters, and those who carried for hire bread or sugar, or tea or coffee, or groceries in general, or other useful commodities".

The distinction in the instant case is of a different sort. The statute does not attempt to impose an arbitrary discrimination between carriers who transport property for hire, or compensation, with respect to the class of products they carry. The exemption runs only to one who is carrying his own livestock and farm products to market or supplies for his own use in his own motor vehicle. In sustaining the exemption, the District Court referred to the factual basis for the distinction. "The legislature knew," said the court "that as a matter of fact farm products are transported to town by the farmer, or by a non-exempt 'contract carrier' employed by him. The legislature knew that as a matter of fact the use of the highways for the transportation of farm products by the owner is casual and infrequent and incidental; farmers use the highways to transport their products to market ordinarily but a few times a year. The legislature rightly concluded that the use of the highways for carrying home his groceries in his own automobile is adequately compensated by the general tax imposed on all motor vehicles." (55 F. (2d) at p. 352.) And the court properly excluded from consideration mere hypothetical and fanciful illustrations of possible discriminations which had no basis in the actual experience to which the statute was addressed. The court found a practical difference between the case of the appellants "who oper-

ate fleets of trucks in the conduct of their business and who use the highways daily in the delivery of their products to their customers," and that of "a farmer who hauls his wheat or livestock to town once or twice a year". The legislature in making its classification was entitled to consider frequency and character of use and to adapt its regulations to the classes of operations, which by reason of their habitual and constant use of the highways brought about the conditions making regulation imperative and created the necessity for the imposition of a tax for maintainance and reconstruction. As the Court said in *Alward* v. *Johnson*, 282 U. S. 509, 513, 514: "The distinction between property employed in conducting a business which requires constant and unusual use of the highways, and property not so employed, is plain enough". See, also, *Bekins Van Lines* v. *Riley*, 280 U. S. 80, 82; *Carley* v. *Snook*, 281 U. S. 66, 73.

The fourth exemption is "of transportation of children to and from school". The distinct public interest in this sort of transportation affords sufficient reason for the classification. The State was not bound to seek revenue for its highways from that source, and, without violating appellants' constitutional rights, could avail itself of other means of assuring safety in that class of cases.

Appellants also refer to the provision of section 21, with respect to liability insurance, that "no other or additional bonds or licenses" shall be required "by any city or town or other agency of this State". The propriety of this avoidance of a duplication of security is apparent.

Decree affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.